

***United States Court of Appeals
for the
District of Columbia Circuit***



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BRIEF FOR PETITIONER

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,246

PLAINS TELEVISION CORPORATION,

v.

FEDERAL COMMUNICATIONS COMMISSION

and

UNITED STATES OF AMERICA,

Respondents,

and

SOILLCOM, INC.,

Intervenor.

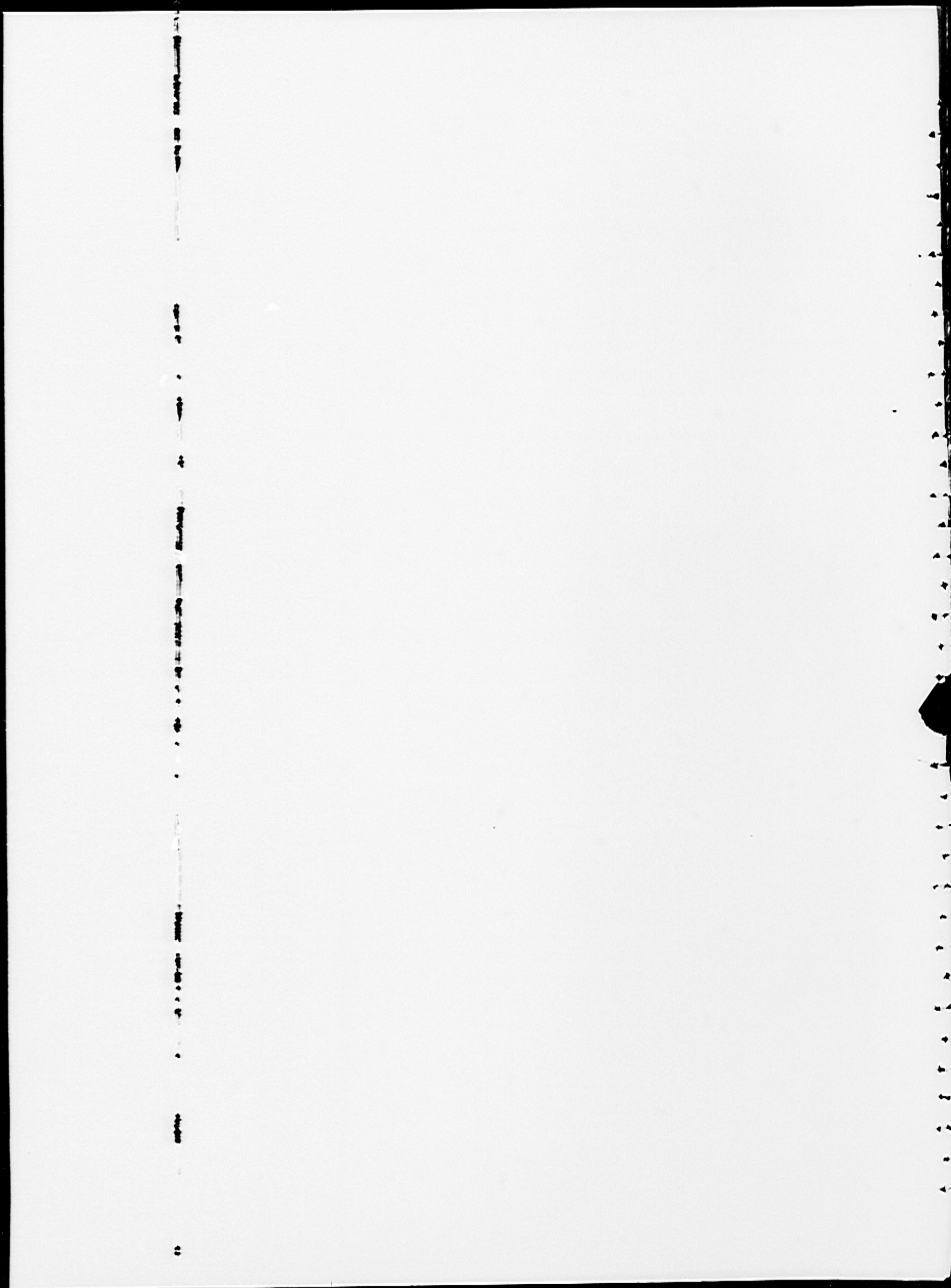
Petition to Review Decisions of
The Federal Communications Commission

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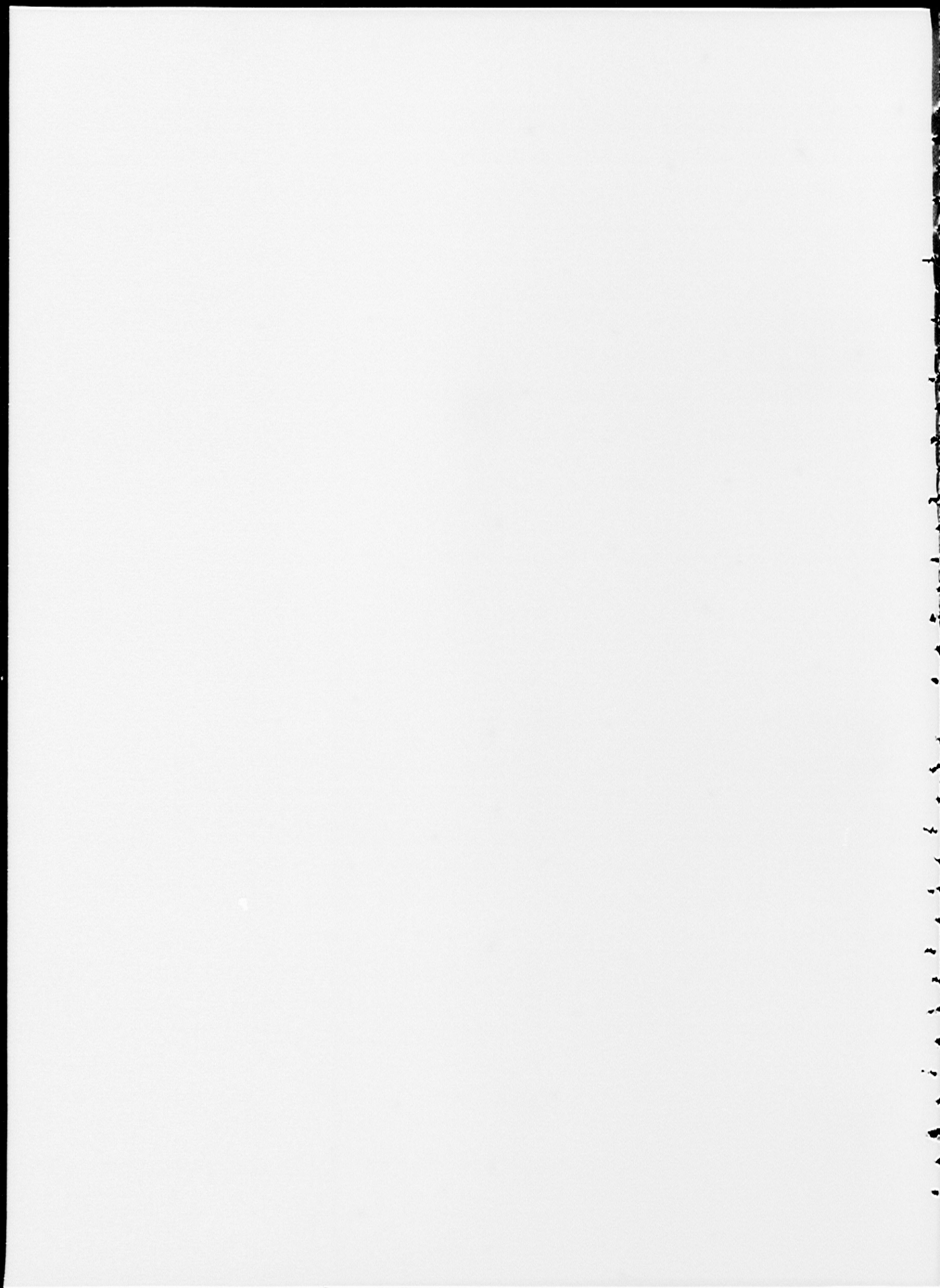
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Petition to Review Decisions of
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BRIEF FOR PETITIONER

STATEMENT OF ISSUES PRESENTED

Petitioner views this appeal as presenting the following issues:

1. Whether, in rule making proceedings leading to the assignment of VHF television Channel 13 to Mount Vernon, Illinois, the Federal Communications Commission acted arbitrarily and capriciously in:

(a) The application of its own and the policy of Congress favoring development of UHF television.

(b) The selection and weight it gave various factors, particularly in the light of results reached in other related proceedings.

(c) The consideration, if any, it gave to alternative courses of action.

2. Whether the Commission's decision to assign VHF Channel 13 to Mount Vernon contravened Section 307(b) of the Communications Act.¹

JURISDICTIONAL STATEMENT

This proceeding arises from a Petition for Review filed pursuant to Section 402(a) of the Communications Act of 1934, as amended [47 U.S.C. 402(a)], by Plains Television Corporation. Petitioner seeks review of two decisions of the Federal Communications Commission: (1) a *Report and Order* of October 31, 1969, released November 4, 1969, amending Section 73.606(b) of its Rules and Regulations to assign VHF television Channel 13 to Mount Vernon, Illinois and (2) a subsequent *Memorandum Opinion and Order* adopted March 18, 1970, released March 20, 1970, wherein the Commission denied petitions for reconsideration of the aforesaid action.

Plains Television Corporation is the licensee of UHF television stations at Springfield and Champaign, Illinois, operating on Channels 20 and 15, respectively. Petitioner participated in the rule making proceedings below which culminated in the decisions here under review.

REFERENCES TO RULINGS

The Commission's *Report and Order* of October 31, 1969 is reported at 17 Pike and Fischer, RRd 1620 and in the Federal Register at 34 F.R. 18036. The Commission's subsequent *Memorandum Opinion and Order* of March 20, 1970 is reported at 22 FCC 2d 222 and 18 Pike and Fischer, RRd 1625.

¹ This case has not previously been before this Court.

STATEMENT OF THE CASE

A. Background

This case concerns the assignment by the Federal Communications Commission of VHF television Channel 13 to the Mount Vernon, Illinois area. The Commission has ruled on this matter on three separate occasions.

First, in a *Report and Order* released March 25, 1958, the Commission denied a request to assign Channel 13 to Cartter, Illinois, located about 13 miles north of Mount Vernon. The basis therefor was that the public interest would not be served by assigning a VHF channel in an area that was essentially a UHF area. The Commission then observed:

"Cartter is a small unincorporated village with less than 100 persons *situated on the periphery of a large UHF area* and lies some 55 miles northwest of Harrisburg, Illinois . . . While the Cartter area presently receives no Grade B service from any existing station, utilization of the newly assigned channels in these communities [Channel 3, Harrisburg, and Channel 8, Carbondale] will provide Cartter with Grade B commercial and education[al] television service . . . [W]e do not believe that any need exists for the assignment of a VHF channel to the small community of Cartter nor that the public interest would be served by the assignment of another VHF channel in this general area."²

Two years later, in a *Memorandum Opinion and Order* released April 11, 1960, the Commission, responding to a petition to assign Channel 13 to Mount Vernon directly, again found that the public interest would not be served by the establishment of a VHF channel in the area. The specific reason then advanced by the Commission for denial of rule making was that the Mount Vernon vicinity was on the periphery of a large UHF area running through central

² *Channel Assignment in Cartter, Illinois*, 16 Pike and Fischer, RR 1628, 1629 (1958). Emphasis supplied throughout this Brief unless otherwise noted.

Illinois. For this reason, the Commission concluded that the signals of a Channel 13 station operating in the area would penetrate this UHF coverage area, add to the number of VHF signals already available on the outskirts of the area, and complicate the growth and successful operation of local television stations. On this occasion the Commission observed:

"... we do not believe that the public interest would be served by assigning an additional VHF channel in this area at Mt. Vernon, some 45 miles north of Harrisburg, to further increase the VHF inroad and impact upon the area of Illinois which is all-UHF. Mt. Vernon . . . receives satisfactory television service from that station [WSIL-TV Channel 3, Harrisburg].

* * *

"... in view of their [Mt. Vernon, Centralia and contiguous Illinois communities] size and proximity to Harrisburg, *the need and advantages to be derived from the assignment of a second VHF channel in this area at Mt. Vernon are not such as would counter-balance the disadvantages of such an assignment upon UHF, generally, in central Illinois.*"³

B. The Instant Proceedings

The third instance in which the Commission considered assignment of Channel 13 to the Mount Vernon vicinity was the immediate rule making proceeding giving rise to this appeal. Prompted by a petition of Soillcom, Inc., Intervenor herein, the Commission, on February 14, 1969, issued a *Notice of Proposed Rule Making* requesting comments on a further proposal to assign VHF television Channel 13 to Mount Vernon.⁴

³ *Channel Assignment in Mount Vernon, Illinois*, 19 Pike and Fischer, RR 1614, 1616 (1960).

⁴ 34 F.R. 2359 (1969). For convenience, hereinafter referred to as *Notice*.

As the Commission has described, Mount Vernon, population 15,556, county seat of Jefferson County, population 32,315, is located in south central Illinois, approximately 75 miles east southeast of St. Louis, Missouri. It is midway between St. Louis and Evansville, Indiana and is the largest city within a radius of over 50 miles.⁵

At the outset the Commission recognized that a channel 13 station, operating at the proposed site (25-30 miles north of Mount Vernon),⁶ would involve overlap with nine authorized UHF stations in varying stages of development.⁷ Accordingly, just as the national commitment to UHF television was a central issue in the earlier deliberations on the proposal, "the chief and fundamental question facing the Commission" in 1969 was still "whether this VHF assignment . . . can be made consistently with the Commission's policy of fostering UHF development."⁸

Petitioner Plains Television, together with another broadcast licensee, joined in opposition comments to the proposal. The comments were supplemented by a 36-page economic analysis of the proposal and an engineering study which included an aeronautical report. Ten other parties, including the original proponent Soillcom, filed comments. Of these, six opposed the assignment, three expressed special concerns of a technical nature, and the proponent alone supported the proposal. The opposing comments, lodged by authorized UHF stations in Springfield, Champaign and Decatur, Illinois, St. Louis, Missouri, and the national All-Channel Television Society (ACTS), were essentially directed to the adverse impact the assignment would have on UHF television. Soillcom, in support of the proposal, argued that the UHF impact was not sufficient to

⁵ Notice, para. 2.

⁶ *Id.* at para. 3.

⁷ *Id.* at para. 8.

⁸ November 4, 1969 Report and Order herein at para. 3, 17 Pike and Fischer, RR 2d 1620, 1621. For convenience, subsequently referenced as *Report and Order*.

deter the assignment and, in addition, that the Mount Vernon area was inimical to a successful UHF operation.⁹

By *Report and Order*, released November 4, 1969, the Commission took a course opposite that taken on prior occasions when the matter was before it, deciding to assign VHF Channel 13 to Mount Vernon. On the critical issue, consistency with its policy of fostering UHF development, the Commission concluded that affirmative action (the assignment) would not "impair a possibility of UHF development in this area which would otherwise exist."¹⁰ The Commission rejected the likelihood of adverse UHF impact, and, instead, focused on what it termed service benefits pursuant to Section 307(b) of the Communications Act and its traditional allocations objectives.¹¹

Plains Television and the All-Channel Television Society subsequently sought reconsideration of the foregoing Commission decision. By *Memorandum Opinion and Order* released March 20, 1970, said petitions for reconsideration were denied. It is this order — finalizing the Commission's decision to assign Channel 13 to Mount Vernon — which has precipitated this appeal.

INTRODUCTION

The following background facts are necessary to a full understanding of the instant controversy generally and the specific UHF policy framework in

⁹ *Report and Order*, paras. 8-9, 17 Pike and Fischer, RR 2d at 1623.

¹⁰ *Id.* at para. 23, 17 Pike and Fischer, RR 2d at 1630.

¹¹ *Id.* at para. 25, 17 Pike and Fischer, RR 2d at 1630.

which it arises. Briefly stated, the so-called "UHF policy", although applied by the Commission, represents a national guideline for the maintenance and growth of television; a guideline structured by the Commission and the Congress and relied on, in varying degrees, by broadcasters, set manufactures, and the viewing public.

A. UHF Television and the FCC

In its spectrum allocation report in 1945, the Commission made it clear that the 13 VHF channels which it there set aside for television use were all that could be spared for that purpose in the VHF portion of the spectrum, that 13 channels (later reduced to 12) were insufficient to provide enough outlets for a nationwide competitive television system,¹² and that television must ultimately find a "home" in the UHF portion of the spectrum. The Commission accordingly reserved a substantial part of the UHF band for experimental television purposes.¹³

As television mushroomed and unforeseen interference problems arose, the Commission's belief that more television channels would be needed was soon vindicated. Accordingly, in its *Sixth Report and Order*¹⁴ of April 14, 1952, issued after a four-year study and a four-year "freeze" on new grants (1948-1952), the Commission added 70 UHF channels (Channels 14 through 83) to the 12 VHF channels theretofore authorized for television use. Basic to this 1952 report, which allocated specific channels to designated cities, was the

¹² "As the Commission has recognized from the outset, and has frequently reaffirmed, the 12 VHF channels alone, are not adequate to make possible sufficient outlets for a fully competitive television system." *Second Report on Deintermixture*, June 26, 1956, 13 Pike and Fischer, RR 1571, 1575.

¹³ Report in FCC Docket No. 6651, Mimeo 82387, May 1945 (See 1 Pike and Fischer RR, Pt. 3, pp. 91:97-98).

¹⁴ 1 Pike and Fischer, RR, Pt. 3, 91:599 (1952).

assumption (then justified but disproved by subsequent developments) that the "intermixture" of VHF and UHF channels in the same major markets would compel the manufacture of nothing but all-channel receivers, and that the new UHF channels would thus become in due course "an integral part of a single, nationwide television service."¹⁵

The decision to "intermix" was not without strong opposition. A number of television set manufacturers had recommended that the overlap of UHF and VHF assignments be held to a minimum.¹⁶ Others argued that "UHF stations would be required to operate at a serious competitive disadvantage with the VHF stations."¹⁷

From the beginning it was clear that the success of intermixture hinged substantially on the creation of confidence in UHF on the part of broadcasters, advertisers and the public. However, this early decision seemed to create an impression of inferiority and, as early as May, 1954, it was apparent that UHF was not faring well.¹⁸ The expectations of a fully competitive intermixed television system making full use of both UHF and VHF were not being met primarily because UHF stations, in the same markets as VHF channels, were at a greater competitive disadvantage than originally anticipated.¹⁹

Since intermixture seemed to be the primary cause of their difficulties, UHF broadcasters sought a remedy through deintermixture — the assignment of channels by rule making to make a given community either all VHF or all

¹⁵ *Id.* at 91:664.

¹⁶ Reply by FCC to Question of Senate Interstate Commerce Committee, 1 Pike and Fitcher, RR 91:125, 91:132 (1949).

¹⁷ *Hearings on the UHF-VHF Allocations Problem Before the Senate Committee on Interstate and Foreign Commerce*, 84th Cong., 2d Sess., Pt. 2 at 792 (1956).

¹⁸ See Bowles, *Supporting Brief*, appended to Ad Hoc Advisory Comm. on Allocations to the Senate Committee on Interstate and Foreign Commerce, "Allocation of TV Channels," 85th Cong., 2d Sess. (Comm. Print 1958) p. 50.

¹⁹ See, e.g., *Coastal Bend Television Company v. United States*, 98 U.S. App. D.C. 251, 234 F.2d 686 (1956); *Jacksonville Journal Co. v. Federal Communications Commission*, 101 U.S. App. D.C. 12, 246 F.2d 699 (1957).

UHF. While at first the Commission was steadfast in its reliance on the *Sixth Report and Order* principles, it subsequently became sufficiently cognizant of UHF's plight to, in 1955, institute rule making proceedings directed toward deintermixture of four cities: Madison, Peoria, Hartford, and Evansville.²⁰ Shortly thereafter, in November of 1955, the Commission determined that the problem of deintermixture was national in scope and that "both fairness and practicability preclude an *ad hoc* approach."²¹ Accordingly, the Commission denied the petitions for local deintermixture and initiated a general rule making proceeding on the subject.²²

On June 25, 1956, the Commission issued its *Second Report on Deintermixture*.²³ In a somewhat unexpected move, the report concluded that the best long-range solution was the shift of all television to the UHF band. Prior to such a shift, however, there would have to be a research program designed to test and improve UHF receivers. As an interim measure, the Commission would follow a policy of selective deintermixture — *i.e.*, deletion of particular VHF channel assignments where feasible in order to provide better opportunities for UHF development, or, alternatively, assignment of VHF channels to particular communities where circumstances warranted.

Still without an adequate solution, the situation having remained fluid during the ensuing years, the Commission, in August of 1961, initiated further rule making to consider proposals for revitalizing UHF.²⁴ Its declared goal was a "system of competitive nationwide and local television services reaching all parts of the country with the largest possible number of program choices and competing outlets of local expression."²⁵

²⁰ *Notices of Proposed Rule Makings*, 1 Pike and Fischer, RR 53:1005, 53:1011, 53:1015, 53:1019 (1955).

²¹ *First Report on Deintermixture*, 13 Pike and Fischer, RR 1511, 1517 (1955).

²² *Ibid.*

²³ 13 Pike and Fischer, RR 1571 (1956).

²⁴ *Expanded Use of UHF Channels*, 21 Pike and Fischer, RR 1711 (1961).

²⁵ *Id.* at 1711.

In order to accomplish this objective, the Commission announced that increased emphasis must be placed upon measures to foster the expansion of UHF broadcasting. Accordingly, a program consisting of the following steps was proposed:

- "(1) Recognition and acceptance of the principle that the UHF TV spectrum is indispensable to the achievement of a nationwide fully competitive television service . . .
- "(2) Encouragement of the use of UHF facilities through the creation of all-UHF areas in markets where multiple services would probably develop if sufficient comparable facilities, not possible under present conditions, can thereby be made available. This involves an expanded program of deintermixture . . .
- (3) Confining interim assignment of additional VHF frequencies at substandard spacings to the most pressing cases of need for early competitive outlets in the major markets where there are already two VHF stations and where the addition of a third VHF station would not impinge significantly upon existing UHF service . . .
- (4) Relaxation of some of the technical requirements for UHF broadcasting, thereby making possible the construction and operation of UHF stations at lower cost . . .
- (5) Permitting VHF stations to operate parallel UHF outlets in the same community under waivers of the duopoly rule. This will involve earmarking for such dual operations enough UHF channels to provide a UHF outlet for each existing VHF station, as well as for all holders of VHF construction permits
- "(6) Earmarking sufficient additional UHF channels to provide for educational needs, taking account of an updated assessment of those needs now being undertaken by educators . . .

(7) Elimination of the table of UHF channel assignments and substitution in its place of an assignment system under which anyone desiring to build a station in a particular community may apply for the lowest locally available UHF channel without antecedent rule making . . .

(8) Eliminating comparative hearings for UHF channels to the end that a qualified applicant will be granted any channel for which he has applied before anyone else. . . .

(9) Employing UHF translators as the preferred means of bringing television service to any remaining white areas. . . .²⁶

The Commission's contemporary UHF policy was thereby deeply implanted as a regulatory goal. To ensure meaningful implementation, however, one additional measure was required, which entailed the assistance of Congress. Specifically, Congress was asked to adopt so-called "all-channel" receiver legislation, giving the Commission authority to require that all television receivers shipped in interstate commerce be capable of receiving UHF as well as VHF channels.

B. UHF Television and the Congress

The policy evolution favoring development of UHF television has been the creation of the Congress as well as the Commission — the former often overseeing and encouraging its application in the hands of the latter.

For example, at about the time the Commission was beginning to recognize the plight of UHF in the initial aftermath of the *Sixth Report and Order*,²⁷ the problems of UHF were being explored in Senate hearings.²⁸ Indeed, as a

²⁶ *Id.* at pp. 1713-1714

²⁷ See, p. 9, *supra*.

²⁸ Hearings on S. 3095, "Status of UHF and Multiple Ownership of Television Stations", Subcommittee on Communications of Senate Committee on Interstate and Foreign Commerce, 83d Cong., 2d Sess., (1954).

result, in part, of studies released by various committees of Congress,²⁹ the Commission on March 31, 1955, reconsidered its earlier actions and instituted five "pilot" rule making proceedings looking toward the deintermixture of various television markets. One of these Congressional reports remarked:

"It seems to us that the importance of preserving UHF at this time is great enough to warrant Commission approval of deintermixture petitions even though some [VHF] applicants may have spent money in prosecuting their applications up to that point."³⁰

Subsequently, in an interim report released July 23, 1956, the Senate Commerce Committee strongly endorsed the Commission's *Second Report on Deintermixture* and urged the Commission to implement the conclusions there reached by a speedy disposition of the individual proceedings which the Commission had instituted.³¹

The activities of Congress with respect to the UHF problem are further summarized as follows:

"The epidemic of UHF failures aroused the concern of the Senate Interstate and Foreign Commerce Committee. Hearings were held before the Subcommittee on Communications in May and June of 1954 on the status of UHF television stations and on a bill to regulate multiple ownership of television stations. By this time a total of 140 UHF stations had gone on the air. Sixteen of these UHF pioneers had already failed. Others were in a state of collapse and some were floundering. The prognosis was grim.

²⁹ See, e.g., the so-called Plotkin Report, "Television Network Regulation and the UHF Problem", Memorandum Prepared for the Senate Committee on Interstate and Foreign Commerce, Comm. Print, 84th Cong., 1st Sess. (1955).

³⁰ *Id.* at p. 12.

³¹ *Senate Report No. 2769*, 84th Cong., 2d Sess.

These hearings were followed by two Senate committee reports, one a progress report by Robert F. Jones, the other a memorandum report by Harry M. Plotkin. It was concluded that there was no quick answer to the problems confronting the Senate committee and that more data and more study were needed.

The UHF-VHF problem continued to deteriorate. No resolution was forthcoming. The Senate Interstate and Foreign Commerce Committee therefore was moved to undertake a second investigation known as the Television Inquiry. Examination of witnesses began late in January 1956. By this time, of some 157 UHF stations which had gone on the air, some 58 had gone off."³²

Paralleling developments before the Commission, in the early 1960's Congress began consideration of a measure designed to revitalize UHF. In perhaps the most explicit statement of congressional policy favoring UHF, Congress in 1962 passed legislation authorizing the Commission to make rules to require all television receivers shipped in interstate commerce to be capable of receiving UHF signals.³³ It was the view of Congress that development of UHF "is not only the best but the only practical way of achieving an adequate commercial and educational system in the United States".³⁴ Observing that the bulk of the UHF band remained unused, the Senate Report goes on to state that:

"This legislation is designed to remedy this situation, for its basic purpose is to permit maximum efficient utilization of the broadcasting spectrum space, *especially that portion of the spectrum assigned to UHF television.*"³⁵

³² Bowles, *Supporting Brief, supra*, note 18 at page 24.

³³ Public Law 87-529, July 10, 1962, 76 Stat. 150, 47 U.S.C. Secs. 303(s) and 330, commonly referred to as the "all-channel receiver law".

³⁴ *House Report No. 1559*, 87th Cong., 2d Sess., p. 4, *Senate Report No. 1526*, 87th Cong., 2d Sess., p. 7.

³⁵ *Senate Report, supra*, note 34 at p. 2.

It is clear, moreover, that Congress did not simply intend that UHF be encouraged as an alternative service in competition with other UHF stations, rather the intent was to develop effective competition between UHF and VHF. It is also clear, intrinsically as well as explicitly, that the all-channel legislation represented a national commitment to the development of UHF.

"For almost 10 years now, both the Congress and the Commission have sought a solution to the difficult television allocations problem . . . Many members of Congress have testified in support of this legislation, which is *designed to implement the Congress' and the Commission's long-range policy of developing an 82-channel system.*" ³⁶

* * * *

"If the American people are to have the chance to enjoy the benefits of television service to the fullest degree, then a major portion of the UHF channels not now assigned must be put into operation."³⁷

Congress was determined to break the "vicious circle" wherein unless the public had sets that could receive UHF, prospective UHF stations were deterred from commencement and, without UHF stations in operation, the public lacked incentive to purchase sets capable of receiving UHF.³⁸ In other words, the appropriate course, as gauged by Congress, was to adopt affirmative measures which would initiate the process of full UHF set conversion. All-channel legislation represents such a measure.

In contrast, the Commission's decisions herein are counter-productive of the legislative intent. Thus, whereas Congress has enacted a law that attempts to

³⁶ *Id.* at pp. 6-7.

³⁷ *House Report No. 1559, 87th Cong., 2d Sess., p. 2.*

³⁸ *Id.* at p. 5.

remove the disadvantage of UHF reception, the Commission falls susceptible to the very "vicious circle" that is to be avoided. It allocates a VHF channel, in part, on the basis of low UHF set conversion — thereby perpetuating the condition of disadvantage.

ARGUMENT

I. THE COMMISSION'S DECISION TO ALLOCATE VHF CHANNEL 13 TO MOUNT VERNON, ILLINOIS IS CONTRARY TO THE PUBLIC INTEREST AS IT IS INCONSISTENT WITH ITS OWN AND THE POLICY OF CONGRESS TO PROMOTE AND ENCOURAGE UHF TELEVISION

The touchstone of all Commission action is the "public interest, convenience or necessity." *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U.S. 134, 137-138 (1940). As of the time the Commission takes affirmative action, by making a grant, adopting a rule, or allocating a frequency, it must find that such action meets this statutory test. *Enterprise Co. v. Federal Communications Commission*, 97 U.S. App. D.C. 374, 231 F.2d 708 (1955), *cert. denied*, *Beaumont Broadcasting Corp. v. Enterprise Co.*, 351 U.S. 920 (1956); *Paramount Television Productions, Inc.*, 8 Pike and Fischer, RR 459, 462 (1952).

In this case the Commission phrased its public interest determination as being "whether this VHF assignment . . . can be made consistently with the Commission's policy of fostering UHF development." (*Report and Order*, para. 3, 17 Pike and Fischer, RR 2d at 1621). The fundamental error results from the resolution of that decisional process.

In introductory material we have shown the progress by which the Commission's UHF policy was shaped. We have also shown the role Congress played in this policy development, including the enactment of legislation to stimulate its fruition. These background developments are particularly important in this case as they are integral to an understanding of the Commission's contemporary implementation of that policy.

At this point, however, it is more useful to focus on the Commission's interpretation of that policy in both (1) circumstances surrounding the immediate area of Illinois where the assignment was made and (2) cases of like import in different locations where contrary results have consistently been reached. From both perspectives of analysis it will be seen that the Commission has acted arbitrarily in treating similar situations in dissimilar ways.

A. The Commission's Specific Encouragement of UHF in Central Illinois

The most obvious aspect of the Mount Vernon assignment is the Commission's abandonment of UHF in the very area where heretofore it had encouraged its growth. Not only does this action run counter to the public interest in terms of the overall UHF policy, but it is a particularly arbitrary application of that policy absent a more rational explanation for the complete reversal of position.

1. Television Allocations in Central Illinois

In 1958, the first assignment proposal, the Commission determined that the public interest would not be served by the allocation of a VHF channel to the Mount Vernon vicinity — "situated in the periphery of a large UHF area."³⁹ This area was described and the concurrent events were noted in the following Commission summary of the comments of one of the respondents in the 1958 proceeding:

"... the Commission recently concluded deintermixture proceedings in which it decided that Peoria and Springfield, Illinois, and Evansville, Indiana, should be made all-UHF; . . .

³⁹ *Channel Assignment in Cartter, Ill.*, 16 Pike and Fischer, RR 1628, 1629 (1958).

that making these communities all UHF will create an irregularly shaped corridor running from Central Illinois through Southern Indiana and into Kentucky in which there is no Grade B service from VHF stations that Cartter lies within this UHF area and that the VHF signal of a channel 13 station in Cartter would envelop a large portion of the UHF corridor and would add to the number of VHF services already available on the fringes of the corridor."⁴⁰

In 1960 the Commission also found that the public interest would *not* be served by assigning channel 13 to Mount Vernon since: "Mount Vernon is on the periphery of a large UHF area running through Central Illinois and south as far as Harrisburg, and *the signals of a channel 13 station at Mount Vernon would penetrate into this UHF area, add to the number of VHF services already available on the outskirts of the area, and make more difficult the growth and successful operation of local television stations in this area.*"⁴¹

The "UHF area" in Illinois the Commission then sought to protect included the area immediately north of the Mount Vernon vicinity made up of Springfield, Champaign-Urbana, Decatur and Danville. Indeed, a number of related actions were then occurring which seemed to buttress the validity of the Commission's 1960 Mount Vernon assignment decision.

For example, during this period the Commission had expended considerable efforts to establish "UHF territory" in a geographical zone running from Peoria, Illinois in the north to Evansville, Indiana in the south. It simply did not make sense, therefore, to drop a VHF channel in the core of this zone. Specific markets where deintermixture proceedings were undertaken to firm up UHF service included Peoria, Springfield and Evansville.

⁴⁰ *Id.* at 1628.

⁴¹ *Channel Assignment in Mount Vernon, Illinois*, 19 Pike and Fischer, RR 1614, 1615 (1960).

As to Springfield, the proposal was initially to deintermix by deleting VHF channel 2 and adding UHF channel 39, assigning channel 2 to St. Louis, Missouri.⁴² Subsequently, additional notices proposed to add channel 26 as well as channel 39 to Springfield⁴³ and to delete UHF channel 36 from St. Louis and add it to Springfield instead of channel 39. Channel 36 had been in operation in St. Louis for some time, the Commission observing that there were "many [television] receivers in the hands of the public in the area between St. Louis and Springfield . . . capable of receiving this [UHF] channel."⁴⁴

Although the Springfield deintermixture proceeding subsequently passed through several levels of Court appeal and Commission proceedings,⁴⁵ the essential Commission proposal to delete VHF from Springfield was ultimately sustained.⁴⁶ Significantly, the Commission found that without the intrusion of new VHF service into this portion of Illinois the area was developing on a stable UHF basis and, since the first decision,⁴⁷ that public acceptance of UHF in Central Illinois had increased substantially. The Commission concluded that if a new VHF station were to go into operation on channel 2 in Springfield further UHF growth would be inhibited and serious deterioration in existing UHF services might well result.⁴⁸

⁴² 21 F.R. 4969.

⁴³ 21 F.R. 5699.

⁴⁴ *Notice of Further Proposed Rule Making*, October 12, 1956, 21 F.R. 7959, 7960.

⁴⁵ See *House Report No. 1559*, *supra*, note 37, Appendix B at pp. 22-23.

⁴⁶ See *Fort Harrison Telecasting Corporation v. Federal Communications Commission*, 116 U.S. App. D.C. 347, 324 F.2d 379 (1963).

⁴⁷ 22 FCC 318 (1957).

⁴⁸ See *Reopened Springfield Deintermixture Case*, Report and Order in Docket No. 14267, July 20, 1962, 23 Pike and Fischer, RR 1579, 1590-1591.

As we have seen, in 1958 and 1960, the Commission refused to permit the assignment of VHF channel 13 to the Mount Vernon area in order to prevent an unnecessary intrusion on UHF development in peripheral areas, including Springfield, Champaign and Decatur to the north. At roughly the same time the Commission was moving to preclude intrusion into Springfield from the north by deintermixing the Peoria, Illinois market.

In a Report and Order released March 1, 1957 the Commission deintermixed the Peoria area, substituting a UHF channel for channel 8.⁴⁹ The interrelationship of these actions is highlighted in the following:

"Our action herein, moreover comports with our decision in the Springfield deintermixture proceeding (Docket No. 11747). In that case we have concluded that the public interest would be served by deleting channel 2 from Springfield. A station on this frequency in Springfield would have provided VHF service to parts of the service areas of the UHF stations in Peoria; and conversely a station on channel 8 in Peoria would provide VHF service to portions of the area that will be served by UHF stations in the Springfield-Decatur area, which the Commission believes should be all-UHF.⁵⁰

Concurrent with these developments, the Commission was also adding to the geographical belt of UHF from Peoria through the center of Illinois by efforts to deintermix the Evansville, Indiana market, directly southeast of the Mount Vernon area.⁵¹ Illustrative of the Commission's overall intent in this regard was its conclusion that "elimination of VHF assignments in the Evansville area not only offered greater promise of the future operation of three or

⁴⁹ *Report and Order in Docket No. 11749*, 22 FCC 342; See also *WIRL Television Co. v. United States*, 102 U.S. App. D.C. 341, 253 F.2d 863 (1958); *WIRL Television Co. v. United States*, 107 U.S. App. D.C. 21, 274 F.2d 83 (1959).

⁵⁰ 22 FCC at 352, note 15.

⁵¹ See *Owensboro-on-the-Air, Inc., v. United States*, 104 U.S. App. D.C. 391, 262 F.2d 702 (1958), cert. denied, 360 U.S. 911 (1959).

more television stations in the Evansville area, but also would serve to encourage the utilization of UHF assignments in surrounding areas."⁵²

2. Previous Refusals to Assign Channel 13 to the Mount Vernon area

As we have noted, against this historical backdrop of allocations, the Commission had also attempted to preserve the Mount Vernon area as one for UHF development by its specific refusal to assign a VHF channel to the immediate area. While each of the previous two decisions centered, as here, on the effects such assignment would have on UHF, contrary results have been reached on essentially the same facts; the first two decisions denying the assignment in deference to the UHF policy and the specific objective of protecting the peripheral UHF areas, the third and instant decision granting the assignment in disregard of the UHF policy and the effects on overlapping UHF stations.

When this proposal was first before the Commission, the proponent at that time simply urged that the assignment could be made in conformance with Commission engineering criteria and that it would bring a new service to an area in need of service.⁵³ On the second occasion when this proposal was before the Commission, the then proponent advanced the same contentions, adding that the Mount Vernon area had become predominantly VHF and that "the further use of UHF at Mount Vernon is neither feasible nor practical."⁵⁴

⁵² *Evansville Deintermixture Case*, Memorandum Opinion and Order in Docket No. 11757, released October 8, 1957, 15 Pike and Fischer, RR 1586 e, 1586 g.. Because of changed circumstances, procedure looking toward full deintermixture of Evansville were subsequently discontinued. *Evansville Television, Inc.*, 2 Pike and Fischer, RR 2d 708 (1964). But see *Channel Assignment in Evansville*, 6 Pike and Fischer, RR 2d 1505 where, as recently as 1965, the Commission refused to shift channel 9 from Evansville, where it is reserved for educational use, to Hatfield, Indiana-Owenstoro, Kentucky for commercial use, because of adverse impact on UHF in the general area, including Evansville, Vincennes, Indiana and Olney, Illinois, the latter near Mount Vernon. 6 Pike and Fischer, RR 2d at 1508.

⁵³ *Channel Assignment in Cartter, Ill.*, 16 Pike and Fischer, RR at 1628 (1958).

⁵⁴ *Channel Assignment in Mount Vernon, Ill.*, 19 Pike and Fischer, RR at 1614. (1960).

Responsive to these contentions in 1960 the Commission declared that "no new facts" had been advanced to warrant assigning a VHF channel to Mount Vernon.⁵⁵ However, when the same basic contentions were raised in 1969 by Soillcom, Inc., the Commission inexplicably, supposedly by the passage of time, treats them as "new" in making the assignment. Whereas the first two proposals were rejected, the third and instant proposal was accepted on the identical bases of need for service, existing VHF penetration in the projected service area and the "infeasibility" of UHF.

The Commission offers no rational explanation for this reversal of position, it simply relies on the expiration of time as developing UHF to a point where it supposedly can better withstand the impact of a competing overlapping VHF. While focusing on the impact such a decision would have on existing UHF stations the Commission conveniently ignores the rationale for developing this area of Illinois as a primary UHF service area.

In order for a court to exercise in any meaningful way its function of review, it is necessary that the Commission state specifically the basis for each of its conclusions. *West Michigan Telecasters, Inc. v. Federal Communications Commission*, 130 U.S.App.D.C. 39, 42, 396 F.2d 688, 691 (1968); *Community Broadcasting Co. v. Federal Communications Commission*, 107 U.S.App.D.C. 95, 104-105, 274 F.2d 753, 762-763 (1960). The Commission has not here adequately and specifically stated the reasons for the disparity of treatment between its early efforts to develop this area as a UHF area and the subsequent disregard of such efforts.

The Commission neither distinguishes nor explains this different treatment in the specific context of the area in question. When it does touch upon the question it is rather in the context of responding to the contention of Plains Television as to the general, national impact the result will have on UHF. (See *Report and Order*, para. 24, 17 Pike and Fischer, RR 2d at 1630).

⁵⁵ *Id.* at 1615.

In the *Notice* (para. 15) the Commission does make a vague reference to "changed circumstances" since its previous denials of the assignment. No further explanation is offered. Further, while the Commission does make reference to the all-channel law as one such "changed circumstance", at the same time it acknowledges the low rate of conversion in this particular area (*Notice*, para. 10; *Report and Order*, para. 23, 17 Pike and Fischer, RR 2d at 1630), and generally institutes a new proceeding to make the law more effective in terms of enhancing tuning comparability.⁵⁶

Indeed, the Commission's action in proceeding with the "UHF tuning" matter represents a rather tacit admission that circumstances may not have changed sufficiently to justify a different application of the UHF policy. While some progress has undoubtedly been made in UHF set conversions, clearly more time is needed before any policy modifications are made in reliance thereon. Conversion and tuning are inextricable elements in achieving competitive UHF/VHF receiver capability. The fact that steps to remedy the one element have only recently been initiated surely dictates a more cautious approach.

As a second "changed circumstance" the Commission indulges in the most cursory reference to what it terms public acceptance of an intermixed VHF/UHF TV system which it declares is "growing rapidly." It also states that "UHF stations in intermixed markets are making *significant gains*." (*Notice*, para. 15) Again there is neither a further explanation nor documentation of this statement. Since UHF stations on a national basis are experiencing a downward trend in revenues from a starting loss position,⁵⁷ it would be interesting

⁵⁶ See *In the Matter of Amendment of Part 15 of the Rules and Regulations With Regard To All-Channel Television Broadcast Receivers*, Memorandum Opinion and Order, released June 29, 1970, in Docket No. 18433, 23 FCC 2d 793.

⁵⁷ For example, whereas in calendar 1968 the number of UHF stations reporting profits totalled 53 (of 118), in 1969 only 50 UHF stations reported profits (of 142). At the same time, whereas 65 UHF stations reported losses in 1968, 92 UHF stations reported losses in 1969. Further, among UHF stations not affiliated with a national network, which includes at least three of the operational stations directly affected by the Mount Vernon assignment, only 2 of 48 or 4.2% of those UHF stations reporting reflected a profit position in 1969. FCC News Release No. 36922, "TV Broadcast Financial Data - 1968", table 5; FCC News Release No. 53501, "TV Broadcast Financial Data - 1969", tables 5 and 7.

to know just what these "significant gains" are. Moreover, and perhaps more importantly, the general Commission statement stands totally unrelated to the specific facts of the specific area under consideration. Without such a delineation of reasoning it is impossible to comprehend not only the Commission's reversal of position but the underlying justification for the assignment.

B. UHF Policy As Applied in Like Circumstances

At the same time that the Commission is apparently abandoning UHF in this area of Illinois, elsewhere the UHF policy seemingly survives with remarkable vitality. This inequitable and uneven treatment of like circumstances, again without sufficient explanation, further highlights the arbitrary nature of the Commission's decisions.

1. Implementation of the UHF Policy Generally

With only a few exceptions, the Commission has followed a steady and consistent course when faced, as here, with problems of competitive impact of VHF television signals upon the development of telecasting in the UHF portion of the radio spectrum. In short, the Commission has patterned and implemented policy on a recognition that intrusion of a new VHF television signal into an area will discourage, if not destroy, prospects for development and maintenance of local UHF television stations.

While the progression of cases articulating this fundamental policy is long and generally unyielding, brief reference, in the light of the apparent conflicting nature of the subject decision, to certain of the more recent of these appears warranted. For instance, in a rule making proceeding which concerned minimal impact of a VHF station upon UHF development in Wichita, Kansas, a television station assigned to Hutchison, Kansas, which already placed a city-grade signal over Wichita, sought permission to change its city of license to Wichita.⁵⁸ The proposal involved neither a move of tower, an increase in

⁵⁸ *Assignment of Television Channel in Hutchison, Kansas*, 7 Pike and Fischer, RR 2d 1577 (1966).

signal strength, nor a change in programming. Nevertheless, when an applicant for a UHF television station in Wichita expressed its unsupported conclusion that the mere change of community would adversely affect UHF development, the Commission refused to effectuate the change. It simply found that the proposed move "would hamper the development of UHF television broadcasting in Wichita."⁵⁹

Of similar import was the recent request of a UHF station in Salina, Kansas to reassign VHF channel 9, Lincoln Center, to Salina, and drop-in channel 6, short-spaced, to replace it. See *Television Channel Assignments at Salina and Lincoln Center*, 11 Pike and Fischer, RR 2d 1704 (1968). The Commission rejected the request, concluding that the Salina area is clearly one of potential UHF development. In this respect, the Commission noted that the fact that one distant station places a VHF Grade A signal over the city and that several other VHF stations place Grade B contours near the city is not sufficient to make it a "VHF area." Accordingly, "[a]doption of the Mid-America proposal would have an adverse impact on UHF development in that part of Kansas." (11 Pike and Fischer, RR 2d at 1712).

It cannot be denied, therefore, that the Commission's case law has affirmatively recognized the pressing and vital public interest in development and maintenance of UHF television stations. In fact, its guiding principle has been to foster "... optimum conditions for the growth of UHF [television] and [of taking] no steps unless required by other exceptional public interest considerations, which would reduce the demand for UHF service." *Triangle Publications, Inc.*, 3 Pike and Fisher, RR 2d 37, 53 (1964). Not only has the Commission rejected VHF drop-in proposals on a short-spacing basis,⁶⁰ but it

⁵⁹ *Id.* at 1581. See also *Channel Assignment in Bloomington-Indianapolis* (Docket 14420), 5 Pike and Fischer, RR 2d 1744 (1965) where the Commission noted that since enactment of the all-channel receiver law it had "found it necessary and desirable to intensify its efforts towards encouraging fuller use of the UHF channels . . .", 5 Pike and Fischer, RR 2d at 1748.

⁶⁰ See *VHF Drop-Ins*, 25 Pike and Fischer, RR 1687 (1963). *Channel Assignments in Selma/Montgomery, Alabama*, 1 Pike and Fischer, RR 2d 1600 (1964).

has in a positive, constructive and consistent fashion denied VHF stations permission to increase facilities that would newly or further infringe on UHF areas, the latter defined in terms of either having existing or potential UHF stations. Indeed, in conflict situations of the latter type the Commission has specifically held that "the paramount policy of fostering UHF service would more than offset the policy of encouraging VHF stations to provide the best possible service to the largest number of persons."⁶¹

2. **Implementation of the UHF Policy in Specific Contrast to the Mount Vernon Assignment Decision**

The Commission's decision in the subject proceeding stands in rather sharp contrast to (1) the continued application of the UHF policy in a general sense in other cases without a conspicuous lowering of standards and (2) its consideration of UHF impact in like VHF assignment cases.

Thus, seemingly with the barest showing of adverse impact, certainly without any reference to a changed standard in this regard, the Commission otherwise continues to remain sensitive to considerations of potential UHF impact. For example, in *Louisiana Television Broadcasting Corporation*, 16 Pike and Fischer, RR 2d 413 (1969), the Commission, upon granting an application to change facilities of an existing VHF station, subsequently accepted a "defective" petition for reconsideration and set the matter for hearing on a "UHF impact" issue. The Commission simply stated, without elaboration, that:

- "The Commission's concern with the development of UHF television is too well known to require further discussion here."⁶²

Thus, at the same time the Commission continues to express concern for the damage to UHF resulting from VHF facility changes, in this case it takes the

⁶¹ *Gala Broadcasting Company*, 13 Pike and Fischer, RR 2d 103, 105 (1968).

⁶² *Louisiana Television Broadcasting Corporation*, 16 Pike and Fischer, RR 2d at 416.

more basic step of permitting the assignment of an entirely new VHF facility in an area surrounded by existing and planned UHF stations.

Even after the decision in this case the Commission has continued to treat UHF impact as a critical unyielding issue — seemingly unaffected by changing or more rigid criteria. For example, in a case decided several months subsequent to the final order herein, the Commission set for hearing, on mere allegation, the application of a VHF station in Charlotte, North Carolina to increase its antenna height and relocate its transmitter site. The question was whether such a move would have an adverse impact on UHF in the Winston Salem-Greensboro-High Point (3 VHF's 1 UHF) and Charlotte (2 VHF's and 2 UHF's) markets. The Commission noted that while it encourages television stations to operate with maximum facilities, "it cannot overlook its concern for fostering the development of both existing and potential UHF stations."⁶³

Four parties submitted petitions to deny the Charlotte application. The UHF impact issue, asserted by each, was prompted by the following minimal showings:

(1) *Greensboro News Company* — simply stated that:

"The intrusion into this market of an additional station, especially an economically powerful one from another market quite clearly will impede if not prevent the successful development of local UHF service."⁶⁴

(2) *Southern Broadcasting Company* —

merely alleged, in general terms, in four paragraphs, that the introduction of a VHF station would fractionalize its audience and seriously affect chances for new UHF growth.⁶⁵

⁶³ *Jefferson Standard Broadcasting Company*, 23 FCC 2d 931, 933 (Memorandum Opinion and Order in Docket No. 18880, released June 24, 1970).

⁶⁴ FCC Docket No. 18880, "Petition to Deny" of Greensboro News Company, p. 4.

⁶⁵ FCC Docket No. 18880, "Petition to Deny" of Southern Broadcasting Company, pp. 4-5.

(3) *Charlotte Telecasters, Inc.* —

in a four-page informal letter objection this party devoted several sentences to a general allegation of UHF impact.⁶⁶

(4) *Piedmont Triad TV, Inc.* —

submitted an affidavit of its station's president arguing that intrusion of an additional VHF signal into Greensboro would lessen its potential revenue base and reduce its chances for success.⁶⁷

We do not do the foregoing UHF impact showings an injustice by the above summaries; nothing of substance is missing. In short, the Commission responded to mere allegations; it did not demand specific allegations, studies or any other demonstration of impact pursuant to a standard arising out of "changed circumstances." Of course, in this context the Commission has determined to explore the matter more fully in an evidentiary hearing. But this merely highlights the surface treatment given to the UHF impact issue in Mount Vernon, a case involving an entirely new VHF assignment.

It is, we submit, even more difficult to justify the Mount Vernon action when balanced against specific VHF *assignment* decisions in other cases. For instance, the Commission recently refused to institute rule making to reassign channel 10 from Helena to Great Falls, Montana to permit the licensee of a Helena station to establish a satellite operation at Great Falls.⁶⁸ The Commission was then of the view that commercial UHF channels assigned to Great Falls and lying fallow could and should be used.⁶⁹ Unlike here, the Commission did not there attach decisional significance to the fact that no one had

⁶⁶ FCC Docket No. 18880, Letter objection of Charlotte Telecasters, Inc.

⁶⁷ FCC Docket No. 18880, "Petition to Deny" of Piedmont Triad TV, Inc., Attached affidavit. For a contrasting demonstration of UHF impact which was rejected by the Commission in this case, see "Joint Comments" of Plains Television and Turner-Farrar, pp. 15-28.

⁶⁸ *VHF Channel Assignment at Great Falls, Montana*, 17 Pike and Fischer, RR 2d 1643 (1969).

⁶⁹ *Id.* at 1645.

to date expressed interest in the UHF channels, rather it took affirmative action to ensure that the service, if needed, be supplied by available UHF frequencies. Also, unlike here, the Commission was unimpressed with the proponent's contention that commercial service on UHF channels 16 or 26 in Great Falls would not be competitive with VHF signals in that city.⁷⁰

In another channel assignment proceeding the Commission refused to institute rulemaking on a proposal to assign VHF channel 13 to Salt Lake City, Utah. *VHF Channel Assignment — Salt Lake City*, 12 Pike and Fischer, RR 2d 1584 (1968). The proponent of the assignment, like Soillcom here, argued that the Salt Lake City area was "not UHF country" and that "only a VHF station could effectively and efficiently satisfy the need for additional television service in the area", citing rugged terrain as one contributing factor and VHF competition as another (12 Pike and Fischer, RR 2d at 1587). The Commission's conclusions warrant emphasis:

"Its adoption [the assignment] would, in our judgment, be a short-sighted and wrong approach to satisfying the need for additional television service in the Salt Lake City area at this time or to further the goals of the Congress and the Commission for a nationwide intermixed VHF and UHF television system.

The 1962 all-channel receiver law and Commission policy and implementing actions are directed foresquare to achieving our national goals for a satisfactory, integrated VHF-UHF system by encouraging UHF set saturation and UHF development. *It is in line with this policy that we have since 1962 refused to make new VHF assignments in communities and areas where it would have an adverse impact upon UHF development.*" (12 Pike and Fischer, RR 2d at 1589)

These conclusions were reached only a year prior to instituting the Mount Vernon rulemaking where quite a contrary course was taken. Importantly, in

⁷⁰ *TV Channel Assignment at Great Falls, Montana*, reconsideration denied, 18 Pike and Fischer, RR 2d 1805, 1808 (1970).

the *Salt Lake City* assignment the Commission went on to imply that while a need for additional service might be established, UHF channels were available for such purpose.

In other cases the Commission encourages UHF growth. In *Mt. Vernon* it seems to either give up on UHF or discard it as a realistic alternative. In *Salt Lake City* the Commission found that a VHF assignment would discourage or destroy the ability of UHF to gain a foothold in the immediate as well as surrounding areas. (12 Pike and Fischer, RR 2d at 1590) In *Mount Vernon* the Commission accepted the proponent's argument that UHF was not a realistic prospect in the immediate area and that, in any event, it could do no harm to UHF in the surrounding areas irrespective of the various stages of development. In *Salt Lake City* the Commission rejected the proponent's arguments and showing relative to the terrain factor for UHF propagation. (*Ibid.*) In *Mount Vernon* the Commission ignored a factual dispute on the terrain factor, impliedly accepting Soillcom's allegations as to the area's unsuitability for UHF service. In *Salt Lake City* the Commission was not swayed by contentions relative to low set conversion, deferring to the effects of the all-channel law, stating the obvious that the addition of a further VHF signal at Salt Lake City could hardly be expected to further the rate of UHF set conversion in this area or opportunities for UHF growth. (*Ibid.*) In *Mount Vernon* the Commission relied, in part, on low UHF conversion in setting the matter for rule-making and ultimately in turning its back on UHF.

Another case of like circumstances but contrasting result is *VHF Drop-In In Staunton-Waynesboro* (Docket 15138), 3 Pike and Fischer, RR 2d 1677 (1964). The proposal there was to assign channel 11 as a "drop-in" first VHF television assignment to Staunton-Waynesboro, Virginia, for commercial use. Like the Mount Vernon area which receives primary service from channel 3 in Harrisburg, Illinois and additional service from St. Louis and other surrounding cities, the Staunton-Waynesboro area received primary service only from channel 3 operating at Harrisonburg, Virginia and additional service from more distant stations at Roanoke, Lynchburg, Richmond and Petersburg. (3 Pike and

Fischer, RR 2d at 1678) In sum, like Mount Vernon, Staunton and Waynesboro are relatively small communities whose principal television service comes from surrounding larger markets.

Like Soillcom, the proponent in the *Staunton-Waynesboro* case argued that the VHF assignment provided "the only realistic means to meet the need of Staunton, Waynesboro, and Augusta County for a viable competitive, local outlet and to expand and improve television service in the area under existing conditions (presence of VHF signals only, no UHF set conversion, the Staunton CATV system) which make UHF operation infeasible." (*Id.* at 1679)

The Commission was nevertheless unpersuaded. It recognized the potential growth for UHF in nearby areas (a new UHF station had been authorized in Charlottesville, Virginia) and concluded that to authorize a second VHF channel assignment "would be a short-sighted approach to the problem of satisfying [the] area's need for additional local television outlets and services and would be at cross-purposes with the Commission's goal of fostering expanded use of UHF channels and optimum conditions for UHF growth." (*Id.* at 1682).

The Mount Vernon assignment, therefore, stands in stark contrast to the Commission's overall treatment of the UHF policy question and its specific implementation in other assignment situations. In less critical and lasting situations — e.g., power and other changes of existing stations — the Commission has and continues to be guided by its UHF policy. In this case, without a clear and concise justification for the different and more rigid regulatory position, the Commission dismisses this policy goal as apparently being present only in circumstances creating a "large wind" of VHF impact. (*Report and Order*, para. 24, 17 Pike and Fischer, RR 2d at 1630) It then goes on to state that the time when such caution as taking into account "any possible small wind of VHF impact" has passed. (*Ibid.*)

Not only is this conclusion contrary to results reached in a long and continuing line of other cases, even as a modified policy statement it is (1) unjustified

and unexplained as to these particular circumstances and (2) incomprehensible as a future policy guideline in any event.

While the principle of *stare decisis* is not a binding one in administrative law, still the fixed policies and well established guidelines of administrative agencies must have stability, consistency and integrity. This would appear to be even more so when such policies and guidelines represent also the "goals of Congress." *VHF Channel Assignment-Salt Lake City*, 12 Pike and Fischer, RR 2d 1584, 1589 (1968)

In its original refusal, and subsequent determination, to allocate VHF channel 13 to Mount Vernon, the Commission not only ignored but affirmatively offended the clear policy goal it has shared with Congress to foster the development of UHF. While other and subsidiary errors were committed, the one which made all errors possible was the Commission's refusal to adhere to this policy proscription.

We have pointed out above the various levels of inconsistency the Mount Vernon assignment produces. In doing so we recognize that the Commission, as a general matter, has considerable discretion in shaping policies. At the same time we would urge that the Commission cannot, in applying such policies, act arbitrarily or treat similar situations in dissimilar ways. Merely asserting that circumstances have "changed" is neither sufficient nor does it "provide a proper guideline for the future exercise of the [Commission's] discretion. . . ." *Burinskas v. N.L.R.B.*, 123 U.S. App. D.C. 143, 148, 357 F.2d 822, 827 (1966). See also *City of Lawrence, Massachusetts v. C.A.B.*, 343 F.2d 583 (1st Cir. 1965). Finally, at the very least, the Commission must explain the inconsistencies and relate the differences, if any, to the purpose of the Communications Act. *Melody Music, Inc. v. Federal Communications Commission*, 120 U.S. App. D.C. 241, 243-244, 345 F.2d 730, 733 (1965). See also *Sunbeam Television Corp. v. Federal Communications Commission*, 100 U.S. App. D.C. 82, 84, 243 F.2d 26, 28 (1957).

II. THE COMMISSION'S DECISION IS ARBITRARY AND CAPRICIOUS IN FAILING TO GIVE ADEQUATE CONSIDERATION TO SEVERAL IMPORTANT FACTORS

In the *Report and Order* here challenged and in the subsequent *Memorandum Opinion and Order* denying petitions for reconsideration, several alternative courses of action were dismissed in a most cursory fashion. At the same time the Commission acted in a discriminatory manner in the selection of and weight attached to substantive facts. Standing alone and balanced against the Commission's UHF policy as applied elsewhere, these factors further underscore the arbitrary and capricious nature of the Commission's action.

A. Service Alternatives

The fundamental premise of the Commission's UHF policy is to encourage and promote UHF television. The Commission acknowledges plainly that this case represents a UHF policy matter. Its curious and rather distinct interpretation and implementation of that policy in these circumstances constitutes the fundamental error in need of remedy.

The Commission seems to peg its decision principally upon the fact that the assignment provides a service to a significant "white area", noting that this is one of the strongest priorities to be met in making a television assignment. (*Memorandum Opinion and Order*, para. 12, 17 FCC 2d at 224) However, Petitioner submits that reliance on the "white area" point is not only misplaced, but irrelevant to the UHF impact issue. The "white area" problem could be resolved by any number of UHF channel assignments⁷¹ and is not dependent on a VHF allocation. Indeed, the Commission itself acknowledges that service to this "white area" is achievable by UHF as well as VHF. (*Ibid.*)

⁷¹ See "Joint Comments of Plains Television Corporation and Turner-Farrar Association", Engineering Statement (Attachment II), page 2 and figure 2, where it is shown that *at least eight different UHF channels could be assigned to Mount Vernon alone.*

Notwithstanding this recognition of its availability, the Commission failed to give adequate consideration to UHF as an alternative. There is no clear articulation whatsoever of the reasons why UHF has been an alternative in like circumstances and not here, nor similar explanation why it was considered as an alternative in 1958 and 1960 Mount Vernon assignment decisions and not now.

In other situations, consistent with its UHF policy, the Commission has affirmatively encouraged UHF by refusing to assign new or additional VHF channels (See pp. 27-30, *supra*). Here the Commission evades such a course of action and relies on vague assignment principles which are in fact irrelevant to the UHF question. To compound this indifference to UHF the Commission further justifies the action taken by pointing to the fact that "no one has evidenced any interest in building a UHF station in the area." (*Memorandum Opinion and Order*, para. 12, 22 FCC 2d at 224) This argument was expressly rejected when voiced by a proponent of a VHF assignment in the *Great Falls* decision, *supra* at pp. 27-28.

On much the same basis the Commission dismissed, without adequate and meaningful analysis, consideration of other alternative means for providing service to the Mount Vernon area. Although Petitioners pointed out that cable television (CATV) serves all of the communities of any measurable size in the Mount Vernon area,⁷² the Commission merely replies that none of the CATV systems is presently large enough (3500 or more subscribers) to fall within the Commission's rule that *requires* program originations. (*Memorandum Opinion and Order*, para. 14, 22 FCC 2d at 225) Further, the Commission ignores the alternative of television satellites all together,⁷³ and dismisses consideration of low-powered community stations and the use of an educational facility on essentially the same basis as it disregards regular UHF as a service alternative —

⁷² "Joint Comments" of Plains Television Corporation and Turner-Farrar Association, *supra*, note 71 at p. 41

⁷³ Suggested at p. 41 of the "Joint Comments" of Plains Television and Turner-Farrar.

no expression of interest to date. (*Report and Order*, para. 28, 17 Pike and Fischer, RR 2d at 1632)

B. Suitability of Location for UHF

In originally urging that this matter be set for rule making, Soillcom relied significantly on the contention that the geographical location was unsuitable for UHF and could support only a VHF television station. In this context, much was made of the assertion that the area in question was unsuitable for propagation of UHF signals due to "rugged terrain." (See, e.g., *Memorandum Opinion and Order*, para. 6, 22 FCC 2d at 223)

Although the Commission did not explicitly recite this factor as contributing to its decision, at the same time it failed to consider the positive question that this area might in fact be suitable for UHF television. The Commission in fact ignored the counter assertion of Plains Television that nothing in the record demonstrated that the area suffered *poor* UHF propagation characteristics.

As Plains pointed out in petitioning for reconsideration, the record can not support the conclusion that "rugged-terrain" creates an insurmountable competitive condition confronting a UHF facility⁷⁴ as alleged by Soillcom.⁷⁵ Indeed, the engineering statement submitted by Plains Television supported the contrary, that terrain is not an inhibiting factor to establishment of a UHF station in this area.⁷⁶ Moreover, this conclusion is not inconsistent with Soillcom's own engineering profile graphs which indicate that the *proposed service area*, not a vague and generalized *geographical area*, is composed of flat land suitable for UHF propagation.

⁷⁴ *Petition for Reconsideration* of Plains Television and Turner-Farrar, pp. 7-8; *Reply to Opposition to Petition for Reconsideration* of Plains Television and Turner-Farrar, p. 3.

⁷⁵ *Opposition to Petition for Reconsideration* of Soillcom, p. 5.

⁷⁶ "Joint Comments," Engineering Statement (Attachment II), p. 2.

These points were, however, conveniently ignored in the Commission's decision denying reconsideration. If the Commission had explored the UHF propagation point, as it should have if it intended to meaningfully apply the UHF policy to this case, it would have found it fallacious and without foundation. UHF could not be denied as an alternative on this basis. Further, the fact that no one had evidenced any interest to date in UHF in that area cannot be equated, as the Commission implicitly does, with the unsuitability for UHF — at least not without a full and open exploration of the point. The lack of interest to date just as, even more, logically can be attributed to the fact that the area is extremely small, and the economy too weak and declining, to support any regular commercial television station.

Moreover, on other occasions concerning this very area as well as in other cases removed from this area, the Commission has flatly and clearly rejected such contentions when balanced against its avowed aim to promote UHF. For instance, in the two previous allocation decisions affecting the Mount Vernon area, terrain was not a decisional factor in the Commission's determination to support the growth of UHF there and in surrounding areas. Further, the Commission's efforts to deintermix the belt running from Peoria to Evansville, through Mt. Vernon, was premised on, *inter alia*, the existence of suitable terrain for UHF propagation. For instance, in the Evansville deintermixture case, at least two of the parties claimed that in the area to the northwest of Evansville (the Mount Vernon vicinity) the terrain consisted of smooth farmland.⁷⁷ As the Commission found:

“The record indicates that the terrain in the Evansville area is generally smooth and consists chiefly of *flat farmlands of Southern Illinois, Southern Indiana and Northwestern Kentucky.*”⁷⁸

⁷⁷ *Evansville Deintermixture Case*, Report and Order in Docket No. 11757, March 1, 1957, 15 Pike and Fischer, RR 1573, 1577.

⁷⁸ *Ibid.*

Also in contrast to the Commission's silence in this case on the terrain factor is its decision in the *Salt Lake City* channel assignment. Faced with very similar arguments from the proponent of the VHF assignment, as to the unsuitability of UHF, the Commission succinctly declared:

"Nor do we feel that there is any justifiable basis for petitioner's claim that this area is inherently 'not UHF country.' Petitioner has made no showing which would lead us to believe that UHF is not technically feasible in this mountainous area or that successful UHF operation would be impossible, particularly in a market of this size."⁷⁹

C. Need for Service

The Commission's action was also taken in disregard of an unresolved factual dispute in the record as to the need for service. This was framed in terms of the extent of existing television service to the Mount Vernon area generally (*Report and Order*, paras. 16-17, 17 Pike and Fischer, RR 2d at pp. 1626-1627) and the extent of UHF development specifically. (*Report and Order*, para. 18, 17 Pike and Fischer, RR 2d at p. 1628)

The conflicting record evidence on this issue consists of Soillcom's random, informal sampling of set owners in 2 of the 9 proposed Grade A counties (*Notice* paras. 10 and 28) and a study submitted by Plains Television which covered all of the proposed service area and was based on recognized industry survey methods. In brief, the Commission's response was to attack the latter (*Report and Order*, para. 17, fns. 9 and 10, 17 Pike and Fischer, RR 2d at p. 1627) and accept the former without challenge.

D. General Impact on UHF

As noted previously (p. 22, *supra*), on the issue of general UHF impact (as distinguished from impact on existing and potential UHF stations in the

⁷⁹ *VHF Channel Assignment - Salt Lake City*, 12 Pike and Fischer, RR 2d 1584, 1590 (1968).

Mount Vernon area) the Commission finds that "changed circumstances" minimize any harmful impact. (*Report and Order*, para. 24, 17 Pike and Fischer, RR 2d at 1630). We have also shown that the principal "changed circumstance" relied on by the Commission, the effects of the "all-channel" law, cannot be reconciled with the ultimate decision reached. In other words, the Commission here maintains that a less cautious approach to UHF impact is now warranted, while, in a contemporaneous proceeding to enhance the effectiveness of the "all-channel" law, recites that we are entering a critical period for UHF.

*"Nevertheless, a critical period for UHF television lies ahead. It is important that unnecessary handicaps or obstacles to the progress of UHF television during this period be removed and that all possible measures be taken to assure it a full and fair opportunity to succeed. Regulation to eliminate or reduce disparities in the case of tuning UHF and VHF channels is one such measure."*⁸⁰

The Commission, moreover, otherwise fails to give appropriate consideration to the national consequences of this assignment. In essence, the assignment of a VHF channel rather than a UHF channel to Mount Vernon, amounts to not only further acknowledgment of UHF's plight, but strikes at the investment heart of that portion of the spectrum. Further, aside from such effects of a future nature, this decision undermines the reliance heretofore placed on UHF by broadcasters and the viewing public. In the same light it foresakes the expenditures of manufacturers and their customers who have respectively developed and purchased television sets capable of receiving UHF.

As we have seen (*supra*, p. 8), from the early days of UHF a fundamental problem has been to create sufficient confidence in its growth and development. The "all-channel" law passed by Congress was one conspicuous effort to instill the requisite confidence. There have been others by the Commission.

⁸⁰ In re *Amendment of Part 15 of the Rules and Regulations with Regard to All-Channel Television Broadcast Receivers* (Docket No. 18433), Notice of Proposed Rule Making, released January 31, 1969, 34 F.R. 1732 at para. 2.

This action is most assuredly not one of them. By curtailing its development here, the Commission inhibits viewer acceptance of UHF everywhere.

III. THE ASSIGNMENT OF VHF CHANNEL 13 TO MOUNT VERNON, ILLINOIS IS CONTRARY TO SECTION 307(b) OF THE COMMUNICATIONS ACT

Section 307(b) of the Communications Act [47 U.S.C. Sec. 307(b)] places a mandate on the Commission to allocate television channels "among the several states and communities [so] as to provide a fair, efficient, and equitable distribution of [television] service to each of the same." This language of Section 307(b) means what it says. See *Federal Communications Commission v. Allentown Broadcasting Co.*, 349 U.S. 358 (1955).

Plains Television finds particularly disturbing the Commission's conclusion that, given the need for local service — and the record is not at all conclusive on this point⁸¹ — the only feasible solution rests with the assignment of this precariously spaced VHF channel.

Thus, the Commission explains that it "regard[s] the provision of service meeting the minimum requirement of [its] rules as important" and thereby instrumental to the action taken. (*Report and Order*, para. 28, 17 Pike and Fischer, RR 2d at 1632) In brief, the allocation fits, it will otherwise go unused, consequently it should be "dropped-in." Yet on another occasion the Commission has, in the context of a 307(b) determination as to the fair, efficient and equitable distribution of radio service, remarked:

"It was certainly not the intent of Congress that at some point in time, the Commission should decide where all available channels should be assigned. Experience has shown that a more fair and equitable apportionment of

⁸¹ The record merely demonstrates that the proponents are desirous of operating a VHF facility and have enlisted local support in that effort. At the same time it also reflects that the area is not without a considerable variety of television service. See "Joint Comments of Plains Television Company and Turner-Farrar", Attachment I, pp. 5-15.

channels is likely to result if the Commission proceeds cautiously in making additional assignments so that developing needs can be met."⁸²

Responsive to the foregoing policy guideline, it is submitted that the assignment of a VHF frequency in the present circumstances does not represent a fair, equitable and efficient use of available frequencies consistent with the statutory mandate. The question is not whether local television service is feasible in south-central Illinois; but rather as to what means are necessary and prudent for its inception. The imbalance and inequity is introduced when the choice is framed, as here, in terms of the selection being limited to the assignment of VHF channel 13: (1) at the risk of harm to UHF telecasting and (2) in the obvious recognition of the availability of alternative solutions.

In exercising its Section 307(b) responsibilities the Commission places undue emphasis on the efficiency or sheer possibility of the assignment, degrading the other equally critical aspects of the congressional directive. (See *Report and Order*, para. 28, 17 Pike and Fischer, RR 2d at 1632, *Memorandum Opinion and Order*, para. 12, 22 FCC 2d at 224) While the Commission appears driven by some compulsion to make this assignment so as to prevent its "waste",⁸³ the identical rationale can be applied to UHF frequencies in the area — if they are not assigned they can not be used.

In sum, the Commission's action is neither "fair" nor "equitable" in its disregard for the development of UHF in this particular area. Over the years,

⁸² *Television Channel Assignment at Raleigh, North Carolina*, 11 Pike and Fischer, RR 2d 1654, 1656 (1967).

⁸³ Interestingly, the Commission reached a contrary result in the 1962 Springfield deintermixture case. There it declared that its "responsibility . . . under the mandate of Section 307 (b) would clearly not be met by a *theoretically feasible VHF assignment* at Springfield . . . which, in light of our conclusions, would have the result, at least for the foreseeable future, of destroying or inhibiting existing service in either or both the Springfield and St. Louis areas . . ." *Reopened Springfield Deintermixture Case*, 23 Pike and Fischer, RR 1579, 1596 (1962).

a good deal of effort has been spent by the Commission and private parties in developing these locations as conducive to UHF growth and service. It is an arbitrary and capricious exercise of Section 307(b) responsibilities to now fore-sake these efforts.

CONCLUSION

In view of the above, it is respectfully submitted that the Commission's action allocating Channel 13 to Mount Vernon should be reversed and set aside.

Respectfully submitted,

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ADDENDUM

Statutory Provisions

Communications Act of 1934, as amended. 47 U.S.C. Sec. 151, *et seq.*

Sec. 307(b): In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

BRIEF FOR INTERVENOR
SOILLCOM, INC.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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v.

FEDERAL COMMUNICATIONS COMMISSION

and

UNITED STATES OF AMERICA,
Respondents,

and

SOILLCOM, INC.,
Intervenor.

Petition to Review Orders of the
Federal Communications Commission

United States Court of Appeals
for the District of Columbia Circuit

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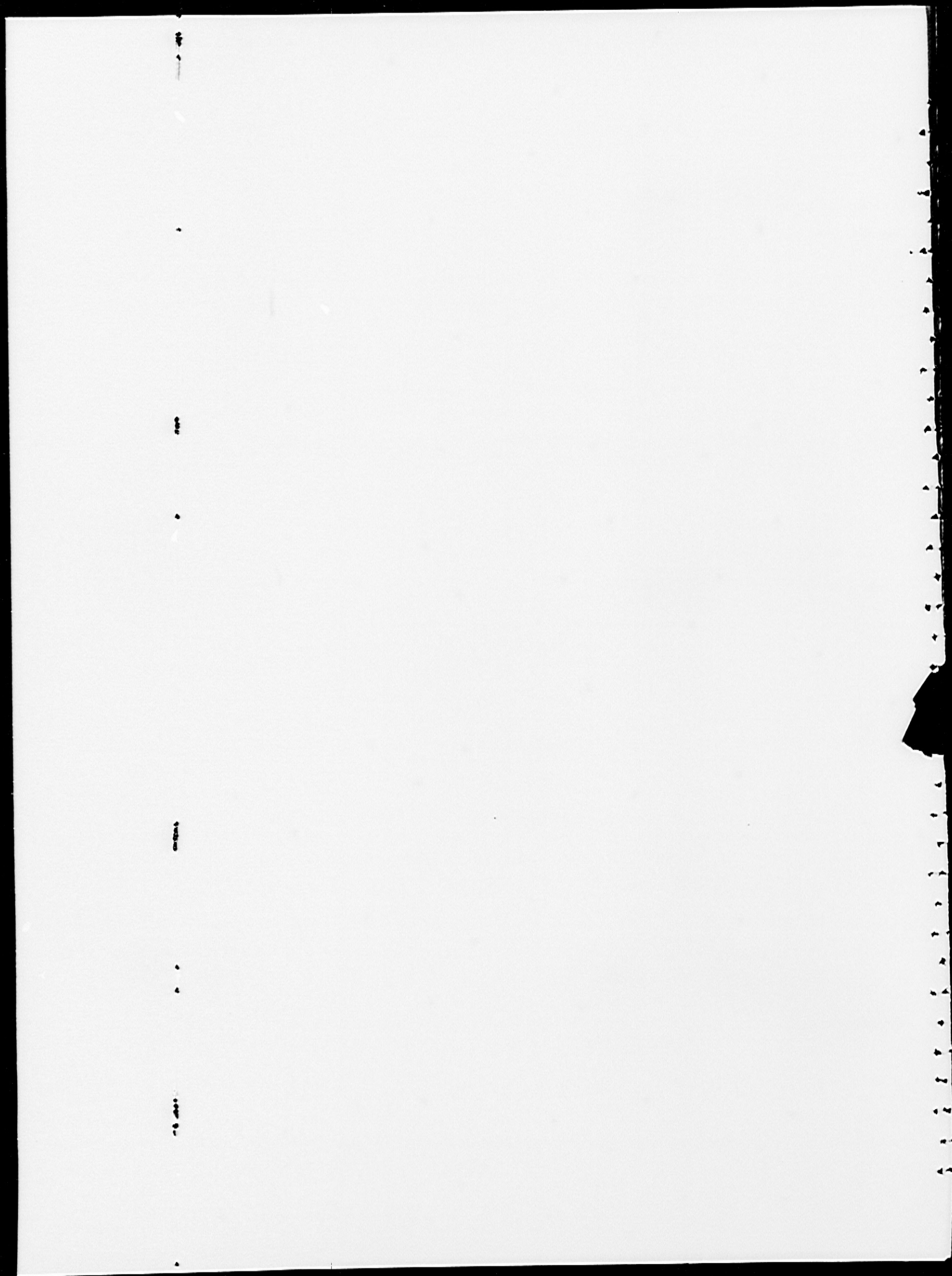
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BRIEF FOR INTERVENOR

COUNTERSTATEMENT OF QUESTIONS PRESENTED

The questions presented by the instant appeal are properly set forth on
page 1 of Respondents' Brief.

COUNTERSTATEMENT OF THE CASE

Intervenor, Soillcom, Inc.,¹ adopts Respondents' Counterstatement of the Case.

ARGUMENT

- I. THE COMMISSION'S ASSIGNMENT OF VHF CHANNEL 13 TO MOUNT VERNON, ILLINOIS, WILL SATISFY A CRITICAL AND UNFULFILLED NEED FOR A FIRST LOCAL OUTLET OF SELF-EXPRESSION IN MOUNT VERNON AND SURROUNDING AREAS OF SOUTHERN ILLINOIS

A. Introduction

Petitioner challenges the Commission's Order (A. 6) amending its Table of TV Assignments (47 C.F.R. §73.606(b)) by allocating VHF television Channel 13 to Mount Vernon, Illinois, and a subsequent Order (A. 20) denying reconsideration thereof. Petitioner argues that there is an "unresolved factual dispute in the record" as to the need for the Mount Vernon channel allocation and that the "record merely demonstrates that the proponents are desirous of operating a VHF facility and have enlisted local support in that effort" (Brief, pp. 36 and 38).² These contentions are wholly without merit.

¹ Intervenor is a corporation owned by a group of local citizens residing in Mt. Vernon, Illinois and nearby communities. At Intervenor's request, the Commission instituted rule making proceedings culminating in the assignment of Channel 13 to Mount Vernon. Thereafter, Intervenor applied for a construction permit for a new TV station on that channel; and, on August 4, 1970, the Commission awarded Intervenor a construction permit, subject to the outcome of this appeal.

² In an attempt to deprecate the comprehensive nature of Intervenor's showing of "need," Petitioner implies that the Commission arbitrarily accepted certain survey materials submitted by Intervenor substantiating the dire need for television reception service in the Mount Vernon area, in preference to the survey materials submitted by Petitioner allegedly indicating to the contrary. This, however, is untrue. The fact is that the Commission did *not* attach decisional significance to the survey materials submitted by either party in reaching its decision herein (A. 17). Hence, Petitioner's claims of an "unresolved factual dispute" on this point are specious.

Of course, Intervenor is "desirous" of providing a new TV service to Mount Vernon and has enlisted "local support" to this end. But, the factual record in this case establishes far more than that which Petitioner would have the Court believe. Thus, Petitioner has conveniently ignored the bulk of Intervenor's extensive and uncontroverted showing, which showing was relief upon by the Commission, clearly demonstrating the great need for a new VHF station on Channel 13 to serve Mount Vernon and nearby areas.

In essence, the fundamental question confronting the Commission herein was whether the requested TV allocation at Mount Vernon, which admittedly would provide (1) a *first* Grade B signal to a substantial "white area"; (2) a *first* Grade A signal to a much larger area;³ and (3) a *first* local television service to Mount Vernon and surrounding communities, outweighed the negligible impact which it would have upon existing or potential UHF stations in the Mount Vernon area (A. 6). The Commission properly determined that such an allocation had "unquestioned advantages" resulting in "undoubted benefits to Mount Vernon and its area of an additional TV station meeting local needs which appear largely unsatisfied at present" (A. 18). The Commission concluded, therefore, that the allocation of Channel 13 to Mount Vernon clearly outbalanced the "minimal effect" which it would have upon UHF television in the Mount Vernon area (A. 23).

As will be demonstrated below, the Commission's conclusion that a pressing and unfulfilled need existed in the Mount Vernon area for a new TV allocation is clearly articulated and amply supported by the record. What is more, Petitioner has made no showing that the Commission abused the broad measure of discretion conferred upon it by the Communications Act of 1934,

³ A Grade B signal is that which is expected to provide a good picture for 90 percent of the time at the best 50 percent of receiver locations. A Grade A signal is that which is expected to provide a good picture for 90 percent of the time at the best 70 percent of receiver locations. See *Clarksburg Publishing Co. v. Federal Communications Commission*, 98 U.S. App. D.C. 211, 215-216, n. 12, 225 F.2d 511, 515-516, n. 12 (1955).

as amended (47 U.S.C.A. §303(g) and (r)) in deciding TV allocations matters such as the instant one. *Van Curler Broadcasting Corp. v. United States*, 98 U.S. App. D.C. 432, 236 F.2d 727, cert. denied, 352 U.S. 935 (1956); *Logansport Broadcasting Corp. v. United States*, 93 App. D.C. 342, 210 F.2d 24 (1954); Section 4(b), Administrative Procedure Act, §5 U.S.C. 553(c). To the contrary, the Commission gave adequate consideration to all relevant matters in reaching its determination. Its action, therefore, should be sustained.

B. Characteristics of Mount Vernon and The Surrounding Southern Illinois Area.

Mount Vernon, Illinois, which has a population of 15,556 persons,⁴ is the county seat of Jefferson County, whose population is 32,315 persons. Situated midway between St. Louis, Missouri, and Evansville, Indiana, in a distinctive portion of the state called "Southern Illinois," Mount Vernon is the largest city within a radius of over 50 miles. It is located in an area of Southern Illinois which is predominantly rural and sparsely settled, with small cities and towns scattered throughout the area (A. 6, 29-30, 37-40).⁵

The northern boundary of Southern Illinois marks the end of the Great Plains of Central Illinois and the start of the hill country of Southern Illinois. In sharp contrast to Central Illinois,⁶ with its prosperous economy based upon the fertile Great Plains, urban population, and diversified industry, Southern

⁴ All population figures cited herein were obtained from the 1960 United States Census. At the time of the writing of this Brief, preliminary 1970 Census statistics for the State of Illinois were not yet available.

⁵ For example, in Intervenor's entire Grade B service area (outside the St. Louis Metropolitan District), there is *not a single* city with a population of over 20,000 persons. Moreover, Mount Vernon is the only city within this area with a population in excess of 15,000 persons.

⁶ Petitioner's two TV stations in Champaign (population 49,583) and Springfield (population 83,271) are located in Central Illinois. Champaign lies about 130 miles from Mount Vernon, and Springfield about 110 miles from Mount Vernon.

Illinois, in general, and Mount Vernon, in particular, have unfertile soil, marginal farming and little industry. For a long time, this area which will be served by Intervenor's proposed station, has been economically neglected and culturally deprived, with declining or static population. But, in the last few years, the Mount Vernon area has undergone some economic and cultural resurgence, which manifestly will be greatly fostered by the establishment of a local outlet for TV programming and advertising (A. 40-48).

It is against this background that the Commission's action herein must be evaluated.

**C. The Allocation of Channel 13 to Mount Vernon Will Result
In Substantial Public Interest Benefits to That Area**

It is uncontradicted that the assignment of Channel 13 to Mount Vernon is fully consistent with, and will implement, the Commission's first two national priorities governing the allocation of TV channels (A. 16); *Sixth Report and Order On Television Allocations*, 1 Pike & Fischer, RR (Part III), 91:601, 620 (1952). The first two priorities for television reception and transmission service, which will be fostered by Intervenor's proposal, are: (1) to provide at least one TV service to all parts of the United States; and (2) to provide each community with at least one TV station. *Ibid*; see *Logansport Broadcasting Corp. v. United States*, *supra*. These two national goals have traditionally been accorded primary importance by the Commission in the furtherance of its TV allocations policies. See *Harrell v. Federal Communications Commission*, 105 U.S. App. D.C. 352, 267 F.2d 629 (1959); *Jupiter Associates, Inc.*, ___ FCC 2d ___, 4 RR 2d Pike & Fischer 355 (1965).

From a technical standpoint, Intervenor's proposed station at Mount Vernon would provide a first Grade B or better signal to a "white area" encompassing 47,483 persons in 1,056 square miles. Moreover, Intervenor's Grade A service area would cover 208,809 persons in an area of 5,275 square miles and nearly 90% of the inhabitants therein — 183,728 persons would receive

their *first* Grade A service. This grossly under-served area of Southern Illinois, which Intervenor will serve, includes both Mount Vernon and Centralia (population 13,904) — the two largest cities in this sector of Southern Illinois — plus a surrounding Nine-County Area, all or most of which lies within Intervenor's Grade A contour (A. 29-36, 161-162).⁷

Standing alone, such facts graphically demonstrate the compelling and urgent need for Intervenor's proposed facility. Yet, Petitioner has completely ignored them. But, neither Petitioner nor the Court can close its eyes to the paucity of TV service presently existing in the Mount Vernon area.

In particular, there are *no* TV channels presently assigned to Mount Vernon, other than Channel 13. Neither is there presently any commercial TV allocation, or existing or proposed station — either VHF or UHF — *within approximately 50 miles of Mount Vernon*, much less within Intervenor's Grade B service contour. Indeed, Mount Vernon itself receives Grade B service from only three VHF stations,⁸ all of which lie at least 75 miles from Intervenor's proposed transmitter site (A. 49-54).

In this connection, the closest and *only* commercial TV outlet in all of Southern Illinois is VHF Station WSIL-TV, Harrisburg, Illinois. However, since Station WSIL-TV does not provide a Grade A signal over either Mount Vernon or any other community in the Nine-County Mount Vernon area, it cannot be expected to meet — nor does it meet — the local programming needs of that area. In short, Station WSIL-TV's programming is directed to another market — Paducah, Kentucky-Cape Girardeau, Missouri-Harrisburg, Illinois —

⁷ The nine counties located within Intervenor's proposed Grade A contour are: Jefferson, Wayne, Clay, Effingham, Fayette, Bond, Marion, Clinton, and Washington.

⁸ Stations WSIL-TV (ABC), Harrisburg, Illinois; WSPD-TV (NBC), Paducah, Kentucky; and KFVS-TV (CBS), Cape Girardeau, Missouri.

lying in a different direction from Mount Vernon and for the most part outside of Illinois.⁹

For example, Intervenor demonstrated below that during a particular week in April, 1969, when Station WSIL-TV was fully monitored, it carried *no* results of elections held that month in 59 Southern Illinois communities; *no* non-network news at all on week-ends; *no* coverage of various local and area matters which had been the subject of recent newspaper stories; and *only three* commercials for Mount Vernon advertisers. In short, Station WSIL-TV carries virtually no news programming or advertising relating to the Mount Vernon area.

In addition, nearly 50% of the population (approximately 264,000 persons) in Intervenor's Grade B coverage area receive TV service from out-of-state stations only. Such stations naturally concentrate on serving the needs and interests of the audiences in the distant major markets to which they are licensed, rather than catering to the specific needs of the Mount Vernon area. Furthermore, still other persons within Intervenor's Grade B service area receive TV service only from Central Illinois stations. These stations not only cover an area entirely different from Southern Illinois, but are also oriented towards meeting needs and interests different from those of Southern Illinois (A. 49-54, 166-178).

From the foregoing, it is evident that Mount Vernon and the surrounding communities of Southern Illinois — which Intervenor will serve — do not currently receive anything approaching service from a local TV station meeting local needs.¹⁰

⁹ In fact, Station WSIL-TV provides Grade B service to only slightly more than 20% of the population within Intervenor's Grade B contour. Over 40% (277,801) of the total population (670,631) served by WSIL-TV resides out-of-state — in Missouri, Kentucky, and Indiana.

¹⁰ Similarly, a void of full-time aural broadcast services also exists within Intervenor's proposed Grade B service area. For, in that entire area comprising 526,614 persons, there are (cont'd)

Finally, the clear and urgent need for a local TV facility has also been expressed and emphasized by many residents of the Mount Vernon and surrounding areas. Numerous letters from civic, governmental, and educational figures and potential advertisers in the Mount Vernon area concerning the dire need for Intervenor's station, and the accruing benefits in improving the social, economical, cultural and educational aspects of Mount Vernon's life were furnished to the Commission by Intervenor. More than 1,340 persons in the Mount Vernon area signed petitions supporting the assignment of Channel 13 to Mount Vernon in order that they "may enjoy the advantages of local television service and not be required to rely on inadequate out-of-state television service" (A. 54-62). On the basis of such outpourings of community sentiment for Intervenor's proposed station, the undeniable need therefor becomes all the more evident.

In sum, as the Commission has properly found, the assignment of Channel 13 to Mount Vernon will utilize an unused but available scarce natural resource which would otherwise be wasted (A. 19). It will make possible a *first* television reception service to substantial areas and populations in Southern Illinois which are presently devoid of *any* Grade A or *even* Grade B service, and will bring additional service to other substantial areas and populations which are deficient in TV reception service. Equally important, it will satisfy a critical need for a *first* local TV station in a number of small cities and towns (including two of the largest cities in Southern Illinois, Mount Vernon and Centralia) and will provide an outlet for locally-originated news, discussion, educational, political, religious, and other programming of vital interest to residents of the area. Since the Commission's action followed a course clearly anticipated and provided for in its *Sixth Report and Order, supra*, "its action

¹⁰ (cont'd) only *two* full-time AM stations (excluding one in the St. Louis Metropolitan Area). One station is located in Herrin (WJPF) and another in Sparta (WHCO), Illinois, respectively, both of which lie at the fringe of Intervenor's Grade B contour. Additionally, in Intervenor's Grade A service area encompassing approximately 209,000 persons, there is *not a single* full-time AM station (A. 49-50).

can in no sense be deemed arbitrary or capricious"; and, thus, it should be upheld by the Court. *Van Curler Broadcasting Corp. v. United States*, *supra*, at 434, 236 F.2d at 729.

II. ESTABLISHMENT OF A UHF STATION IN THE MOUNT VERNON AREA IS UNLIKELY FOR THE FORESEEABLE FUTURE

Petitioner argues that the Commission failed to give "adequate consideration" to the utilization of a UHF channel at Mount Vernon as an alternative to a VHF channel. In this connection, Petitioner maintains that the Mount Vernon area is not unsuitable for UHF development, even though it admits that no interest in constructing a Mount Vernon UHF facility has been evinced to date¹¹ (Brief, pp. 32-36). Petitioner is wrong on both counts. For the Commission did, in fact, thoroughly consider the feasibility of allocating a UHF channel to Mount Vernon, but, on the basis of the evidence submitted, concluded that such an alternative does not offer a realistic solution for meeting Mount Vernon's needs (A. 15-17, 22-24).

Specifically, the Commission properly found that "the establishment of a regular UHF station [in Mount Vernon] appears unlikely for the foreseeable future" (A. 15). Noting that there are presently *no* UHF assignments in Mount Vernon or in Intervenor's proposed Grade A or Grade B service areas, the Commission explained that "while such [UHF] assignments could readily be made, no demand therefor has been advanced" (A. 15). And, in this connection, the Commission stated:

"[I]n view of the rather low UHF set penetration in the area except near the Central Illinois UHF stations to the north

¹¹ It should be stressed that Petitioner's suggestion that UHF television is the "answer" to Mount Vernon's need for a first TV facility is inconsistent with its position below that even a VHF station in Mount Vernon would not achieve economic viability (A. 103-106). Consequently, if Petitioner really believed that a VHF facility in the Mount Vernon area would not survive, it is difficult to understand the basis for its view that a UHF station could survive there. In any event, Petitioner has made no probative showing supporting its thesis.

(no more than about 40 percent in Mount Vernon's county), and the fact that any station in or near Mount Vernon would face competition from numerous long-standing VHF stations (particularly those to the south, and also those at St. Louis and Terre Haute)", establishment of UHF is not likely (A. 15).

These conclusions were well-reasoned and fully justified on the basis of the record below. Of critical importance, Intervenor demonstrated that for a number of reasons, the chances of establishing a UHF station in the Mount Vernon area were virtually non-existent. In the first place, Mount Vernon and the surrounding areas of Southern Illinois simply are not "UHF-country." There are presently no UHF allocations in the area. Indeed, there are no existing or proposed UHF stations within Intervenor's entire Grade B service area. In fact, the closest UHF stations are located in St. Louis, Missouri — some 70 miles distant from Mount Vernon (A. 62-64, 166-168).

Second, since the TV signals receivable in the Mount Vernon area are overwhelmingly VHF (See Part I, *supra*), the bulk of home receivers in the area are equipped to receive only VHF signals.¹² Thus, despite the passage of the "All Channel Receiver Bill" in 1962 (47 U.S.C. 303(s)), the circulation of UHF sets in the Mount Vernon area was still lagging some six years later (A. 64-70). Certainly, it will be many years before the tremendous handicap of low UHF circulation and audience in the Mount Vernon area will be substantially removed, particularly in view of the overwhelming predominance of VHF signals in that area. Until such a handicap is eliminated, any new UHF

¹² Based upon an informal survey conducted by Intervenor in early 1968, it was shown that only 33-1/3% of the homes in Jefferson County — Mount Vernon's home county — were equipped to receive UHF signals. Petitioner's survey, however, indicated that there was about 40% UHF circulation in Jefferson County and 53% in Intervenor's predicted Grade A service area. However, as was pointed out by Intervenor's economic consultant, Petitioner's analysis over-stated the ability of homes in the area to receive UHF signals; and, even if such figure were assumed to be accurate, a new UHF station in Mount Vernon would still face a tremendous handicap with only about 40% UHF circulation in its home community, and 53% in its Grade A service area — the heart of its market (A. 11-13, 167-168).

station serving the Mount Vernon area must necessarily face insurmountable obstacles in its quest for viability.

Third, any new UHF station in the Mount Vernon area will have to compete with *seven* well-entrenched VHF stations which provide Grade B service to Mount Vernon, or near Mount Vernon, and Centralia, the two largest communities in Intervenor's proposed Grade B service area.¹³ Four of these seven stations are located in St. Louis, the nation's 11th ranked TV market. Three of the four St. Louis VHF stations are affiliated with national networks and enjoy a weekly circulation of more than 50 percent in seven of the nine counties (the Nine-County Area) comprising the heartland of the Mount Vernon market. The remaining three network-affiliated VHF stations penetrating the Mount Vernon area, including Station WSIL-TV in Harrisburg, are located in the Cape Girardeau-Paducah-Harrisburg market to the south (A. 168-169).

Significantly, the principal competitor of any new Mount Vernon UHF station for audience, local revenue and locally-originated programming will be VHF Station WSIL-TV in Harrisburg. Not only will this station provide the strongest signal to the Mount Vernon area and penetrate deeply into the service area of a Mount Vernon UHF station, but it also presently provides the only practicable TV outlet for local programming and advertising directed to the Mount Vernon area. Confronted with such formidable VHF competition, any new station in Mount Vernon plainly would be able to compete on roughly equal terms *only* if it were a VHF facility (A. 172-173).

Fourth, the rural economy of the Mount Vernon area is inimical to the establishment of a viable UHF station. No sizeable concentration of urban population exists, which is necessary for the support of a UHF station.¹⁴ Only

¹³ As heretofore noted, Mount Vernon receives Grade B service from three VHF stations. Centralia, however, receives service from five such stations.

¹⁴ Indeed, the population density within Intervenor's Grade A contour is only 36 per square mile, and the population is 65% rural — more rural than North Dakota, the most rural of all states (A. 37-40).

a handful of small towns and cities are scattered throughout the Mount Vernon area.¹⁵ Accordingly, this area is a prime example of the very "rural areas of low population density" and "cities of small size" which the Commission has held negates any "realistic potential" for development of a new UHF station. *KTIV Television Co.*, ____ FCC 2d ____, 4 Pike & Fischer 2d 243, 246-47 (1965).

What is more, the unsuitability of the economy of the Mount Vernon area for UHF development has led the Commission to recognize the futility of maintaining previously-assigned UHF channels there. From 1962 to 1965, UHF channels were assigned to several Southern Illinois cities, including Harrisburg and Mount Vernon. Yet, the only UHF channel ever activated in the entire area was that at Harrisburg — in 1953 by then-UHF Station WSIL-TV. In 1958, however, Station WSIL-TV was forced to shift to VHF Channel 3 because a "*multiplicity of VHF service in the area makes it impossible for a UHF station to survive*" (emphasis added). *Harrisburg Drop-In Case*, ____ FCC ____, 16 Pike & Fischer, RR 1617, 1618 (1958).

More importantly, in TV allocation proceedings adopted in 1965, three years after enactment of the "All Channel Receiver Bill", the Commission concluded that there was "no reasonable expectancy" for activation of the commercial UHF channels in the small towns and the rural, sparsely settled area

¹⁵ Significantly, within the entire Nine-County Area except for Mount Vernon and Centralia, there are only five communities with a population of over 5,000:

<u>City</u>	<u>County</u>	<u>City Population</u>
Effingham*	Effingham	8,172
Fairfield*	Wayne	6,362
Salem*	Marion	6,165
Vandalia*	Fayette	5,537
Flora	Clay	5,331

* County Seat.

Thus, three of the counties in the Nine-County Area (Washington, Clinton and Bond) have no community with as many as 5,000 people!

of Southern Illinois, and therefore all such UHF assignments – including the one for Mount Vernon – were eliminated from that area. *Fourth Report on UHF Channel Assignments*, ____ FCC ____, 5 Pike and Fischer, RR 2d 1587, 1593 (1965).

From the foregoing, it is patent that the Mount Vernon area is so uncongenial and inhospitable to UHF television development that the establishment of a new UHF station there is highly unlikely for the discernible future (A. 195-198). For this reason, the Commission has reasonably concluded that *only* a new VHF station at Mount Vernon, as proposed by Intervenor, can provide immediate service benefits to that area and meet its presently unfilled local needs (A. 19).

CONCLUSION

For the foregoing reasons, the Commission's Orders under review herein should be affirmed.

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BRIEF FOR RESPONDENTS

DEC 3 1970

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

Martin R. Wilson

No. 24,256

PLAINS TELEVISION CORPORATION,
Petitioner,

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents,

SOILCON, INC.,
Intervenor.

ON PETITION FOR REVIEW OF A MEMORANDUM OPINION
AND ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

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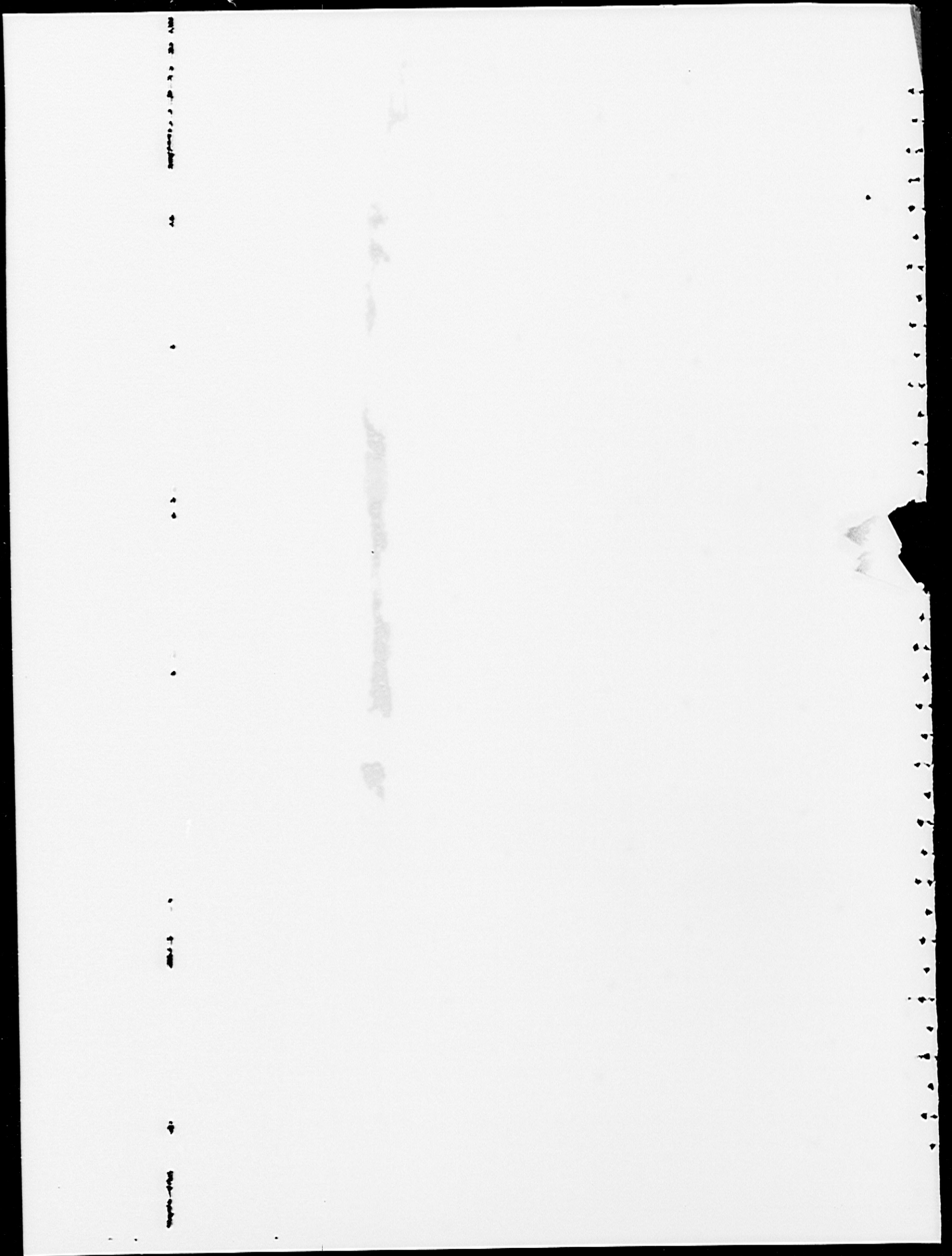


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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,246

PLAINS TELEVISION CORPORATION,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents,

SOILLCOM, INC.,
Intervenor.

ON PETITION FOR REVIEW OF A MEMORANDUM OPINION
AND ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR RESPONDENTS

COUNTERSTATEMENT OF ISSUE PRESENTED *

Whether the Commission, in assigning VHF channel 13 to Mt. Vernon, Illinois, reasonably applied prevailing policies to the factual situation in its weighing of the need for the service to be provided against the possible impact which the VHF assignment might have on the development and maintenance of UHF television.

*/ This case has not previously been before this Court.

COUNTERSTATEMENT

This case involves a petition for review brought under Section 402(a) of the Communications Act of 1934, as amended, 47 U.S.C. 402(a), from a Report and Order adopted on October 31, 1969, which amended Section 73.606(b) of the Commission's Rules to assign VHF television channel 13 to Mount Vernon, Illinois (A. 6-19), and a Memorandum Opinion and Order adopted March 18, 1970, which denied reconsideration of the above action (A. 20-24). Petitioner Plains Television Corporation is the licensee of UHF television stations in Springfield and Champaign, Illinois. Plains' "Statement of the Case" dwells on UHF policy generally, with scant attention paid to the facts of the instant case and the basis of the Commission's decision under review. This counterstatement therefore attempts to familiarize the Court with these aspects of the case.

On November 18, 1968, Soillcom, Inc., intervenor herein, filed a lengthy petition for rulemaking requesting the assignment of Channel 13 to Mount Vernon, Illinois. (A. 25-84)^{1/}. The essence of that petition was that Mt. Vernon has no television channel assignments, that it is the largest city within a radius of 50 miles (15,556 persons), that channel 13 must be placed just north of Mt. Vernon if it is to be used at all in the area, that Soillcom's

^{1/} Section 73.606(b) of the Commission's Rules consists of a table of assignments for television channels by geographical location.

proposal for channel 13 would provide a first television service to 48,799 people and a first Grade A service to 204,053 people,^{2/} and that such an assignment would not significantly affect existing or possible UHF stations. The latter contention was buttressed by extensive and detailed studies tending to show that VHF is dominant in the area, and that the competitive situation and economy are inimical to a new UHF station. Soillcom also showed that there was a great need for a local programming outlet in the Mt. Vernon area since no other stations carried any significant amounts of local news or information. No responses to the petition were filed. Then, on February 12, 1969, the Commission adopted a Notice of Proposed Rule Making designed to publicly explore the feasibility of Soillcom's proposal (A.1-5). The Commission first summarized Soillcom's contentions and then referred to its two prior refusals to assign channel 13 in that part of Illinois, 16 Pike & Fischer, R.R. 1628 (1958), and 19 Pike and Fischer, R.R. 1614 (1960). Both refusals were based on UHF impact, but the Commission felt that "circumstances" had changed in the intervening nine years. Specifically, the Commission cited the gathering effect of the all-channel receiver legislation of 1962,^{3/} and the increasing public acceptance of an intermixed VHF/UHF television system.

^{2/} A Grade B contour is the imaginary line along which a good picture may be expected for 90 per cent of the time at the best 50 per cent of the locations. The Grade A contour defines the area at the perimeter of which a good picture is received for 90 per cent of the time at the best 70 per cent of the locations. See Clarksburg Publishing Co. v. F.C.C., 96 U.S. App. D.C. 211, 215-216, n. 12, 225 F.2d 511, 515-516, n. 12 (1955).

^{3/} Public Law No. 529 approved July 19, 1962, 76 Stat. 150, 47 U.S.C. 303(s), authorized the Commission to require all television receivers shipped in interstate commerce, or imported into the United States, to be capable of receiving UHF as well as VHF signals.

The Commission therefore felt that the prior acute sensitivity to any impact on UHF is no longer necessary. Thus, in light of the proposed efficient use of channel 13 and the seemingly slight impact on UHF, the Commission decided to put out Soillcom's proposal for comment.

Comments on the proposal were filed by several parties. Some were not opposed to the assignment per se, but rather they expressed concern about maintaining the Commission's spacing requirements (47 CFR 73.610(b)) and about a possible air hazard resulting from Soillcom's proposed tower.^{4/} The remaining parties opposed the assignment, mainly on the ground of alleged impact on UHF. Chief among the latter comments were those filed jointly by petitioner Plains and Turner-Farrar Association, licensee of VHF channel 3 in Harrisburg, Illinois (A. 85-153).

After considering all of the arguments pro and con, the Commission made the assignment of channel 13 to Mt. Vernon in a Report and Order adopted October 31, 1969 (A. 6-19). The Commission stated the ultimate issue as the weighing of impact on UHF against the need for the service which the new assignment would provide. As to impact, the Commission noted that there are three forms it could take: impact on UHF in the proposed city or its immediate area, impact on existing or proposed UHF stations which the proposed

^{4/} This problem was ameliorated later by Soillcom's amended proposal to construct an 800-foot tower rather than the originally proposed 990-foot structure.

station would overlap, and impact on UHF generally. The Commission first found that there are no UHF assignments in the proposed Grade B service area, that there has been no demand for such an assignment, that UHF set penetration is rather low and that any UHF station would face severe competition from already established VHF facilities which put signals into the area. It concluded in light of these facts that prospects for UHF development were quite remote and that accordingly Soillcom's proposal would have no adverse impact on UHF in the immediate area at this time (A. 15). With regard to general UHF impact, the Commission repeated what it had said in the Notice of Proposed Rule Making, supra, about changed circumstances in television. It noted the ultimate effect of the all-channel receiver legislation and the then pending inquiry on improved UHF tuning,^{5/} and stated that until the disparity between UHF and VHF is eliminated, the question of UHF impact is of concern but that "this is not to say that we must insulate every UHF station or potential station from any possible small wind of VHF impact, where there is a substantial service benefit involved in a different course." (A. 16).

Applying the above policy to the situation before it, the Commission divided the question of direct impact on existing UHF stations into two geographical parts, the St. Louis UHF stations and the central Illinois stations.^{6/} As to the former, Soillcom's VHF proposal would overlap the contours of the two St. Louis UHF stations to some degree,^{7/} but Soillcom's Grade B

^{5/} New rules have since been adopted to improve UHF tuning, Report and Order in Docket No. 18433, 35 F.R. 2660, and Memorandum Opinion and Order, 35 F.R. 10766 (1970).

^{6/} See the attached map for a graphic picture of the overlap situation.

^{7/} The maximum overlap of the Grade B contours would involve 8.7% of the population within KGSL-TV's service area and 9.3% of the population within KNDL-TV's service area. The Grade A contour overlap is of course considerably smaller.

contour would fall 8 miles short of St. Louis. St. Louis already has four commercial VHF stations which serve virtually all of the overlap area, and other VHF signals are also received. Thus the Commission concluded that the addition of another VHF signal from a small and distant (70 miles) city such as Mt. Vernon would not add significantly to the St. Louis UHF stations' burden (A.16). Four central Illinois UHF stations would have a small amount of contour overlap with Soillcom's proposal (two of these are commonly owned, one of which is the auxiliary outlet of the other). Soillcom's proposed Grade B contour does not reach any of the four stations' cities of designation (24 miles from Decatur is the closest), the overlap is actually less than in the case of the St. Louis stations, none of the four cities are closer than 100 miles from Mt. Vernon, the three stations which opposed the assignment are "well-established, network-affiliated, reasonably profitable operations,"^{8/} and the area is a highly converted established UHF territory. Thus the Commission was able to conclude that Soillcom's proposal would not have a significant impact on any of these central Illinois stations.^{9/}

^{8/} The fourth station, a new operation in Jacksonville, Illinois, will suffer only a small amount of Grade B contour overlap to the south since it uses a highly directionalized east-west pattern to serve the UHF areas around Quincy, Illinois, to the west and Springfield, Illinois, to the east (A.17).

^{9/} There apparently would also be a very small amount of Grade B contour overlap with the two UHF stations in Evansville, Indiana. This area is small, entirely in Illinois, and fairly close to Mt. Vernon; thus it poses no impact threat (A.17).

The Commission therefore concluded that "neither individually nor collectively do we believe the possible impact warrants denial of the proposed assignment" (A. 17). This being so, the Commission was able to turn to the need for the service proposed by Soillcom. Mt. Vernon has no local television station and it was shown that very little news of the Mt. Vernon Area appears on the stations serving the general area. There is considerable evidence of need in this regard, both from a service and an economic viewpoint. The closest commercial station or assignment is Turner-Farrar's VHF station 50 miles from Mt. Vernon in Harrisburg, Illinois.

Plains and Turner-Farrar suggested several alternative methods of providing service to Mt. Vernon. The Commission considered and rejected all of these suggestions (A. 17-18). Thus, it was stated that CATV only serves paying subscribers and does not serve rural areas at all; a UHF station would not be able to thrive in the area; and an educational station would not meet the economic needs of the area. From a technical standpoint, Soillcom's proposal would provide a first grade B or better television signal to 47,483 persons in 1,056 square miles. All of this "white area" would in fact receive a Grade A signal from Soillcom. Furthermore, 90% of the people in Soillcom's predicted Grade A service area (183,728 out of 208,809 persons) would receive their first Grade A signal. This area includes Mt. Vernon and most of the 9-county area in which Soillcom proposes to concentrate its efforts (A. 11).

The demononstrated need for Soillcom's proposed service, as summarized above, when coupled with the minor impact on UHF which the proposal would cause, led the Commission to conclude that the assignment of Channel 13 to Mt. Vernon would be in the public interest.

Plains and Turner-Farrar filed a joint petition for reconsideration, as did the All-Channel Television Society. The gist of these petitions was that the Commission erred in its decision on the UHF impact issue and in considering service alternatives for the area. These petitions were denied by the Commission in a Memorandum Opinion and Order adopted March 18, 1970 (A.20-24). The Commission noted that every argument in the reconsideration pleadings had been dealt with in detail in the first opinion. It went on to say that the channel can be assigned to Mt. Vernon in conformance with the Commission's Rules and that it cannot otherwise be used in the area. The Commission repeated the essence of its holding, "that the Commission considered the overlap question as to all the UHF stations, both operating and proposed, and found that the first service to Mt. Vernon and the area outweighs the minimal effect on existing or potential UHF stations." (A. 23).^{10/}

^{10/} This opinion also noted the settlement of the air hazard issue via a letter from the FAA based on Soillcom's amended 800-foot tower proposal (A. 21)..

Finally, on August 11, 1970, the Commission gave a grant of a construction permit for channel 13 to Soillcom conditioned on the outcome of this appeal. Soillcom had filed its application after the Report and Order was issued assigning the channel to Mt. Vernon. No petitions to deny this application were filed and this grant is not under review. Plains' petition for review only questions the rulemaking decision assigning the channel.

ARGUMENT

At the outset we note that a challenge, like that being made by Plains, to the allocation of a television channel in a rulemaking proceeding must demonstrate that the Commission has abused the broad measure of discretion conferred upon it by the Communications Act in deciding questions such as these. The scope of judicial review is limited to the question of whether the rule adopted has a rational relation to considerations properly of concern to the Commission.

American Telephone and Telegraph Co. v. United States, 299 U.S. 232, 236-237 (1936); Coastal Bend Television Co. v. F.C.C., 98 U.S. App. D.C. 251, 255, 234 F.2d 686, 690 (1956); Van Curler Broadcasting Corp. v. United States, 98 U.S. App. D.C. 432, 236 F.2d 727, cert. denied, 352 U.S. 935 (1956); Rhode Island Television Corp. v. F.C.C., 116 U.S. App. D.C. 40, 320 F.2d 762 (1963). And, since this proceeding was rulemaking and not adjudication, "the Commission was required to make merely 'a concise general statement of their [i.e. the rules'] basis and purpose.'" Van Curler Broadcasting Corp. v. United States, supra, 98 U.S. App. D.C. at 434, 236 F.2d at 729; Section 4(b), Administrative Procedure Act, 5 U.S.C. 553(c). In the instant case the Commission went well beyond this

requirement to fully explain the reasoning behind the assignment of channel 13 to Mt. Vernon.

A. The Commission Clearly Justified Its Decision To Drop-In Channel 13 At This Time In Terms Of The Changed Circumstances Since 1960.

Plains attacks the Commission's assignment action as being inconsistent with its two prior refusals to assign a VHF channel to the Mt. Vernon area. It further asserts that the Commission gave "no rational explanation for this reversal of position." In the first place, Plains' attack on the adequacy of the Commission's reasoning is totally inappropriate. As noted above, this is a rulemaking proceeding, not adjudication as in the two cases cited by Plains (Brief, p. 21), and all that is required is "a concise general statement" of the rule's basis. Section 4(b), Administrative Procedure Act, 5 U.S.C. 553(c). See Van Curler Broadcasting Corp. v. United States, supra; Logansport Broadcasting Corp. v. United States, 93 U.S. App. D.C. 342, 210 F.2d 24 (1954). The Commission, however, provided far more than "a concise general statement." Insofar as the Commission reached a different result in 1969 than it did in 1958 and 1960, it is worth repeating what the Supreme Court said in the Permian Basin Area Rate Cases, 390 U.S. 747 (1968), at p. 784: "Nor may its [the agency's] order

properly be set aside merely because the Commission has on an earlier occasion reached another result; administrative authorities must be permitted, consistently with the obligations of due process, to adapt their rules and policies to the demands of changing circumstances." See also Davis, Administrative Law, §18.09 (1958); S.E.C. v. Chenery Corp., 332 U.S. 194 (1947); and F.C.C. v. WOKO, 329 U.S. 223 (1946). In the instant case circumstances had changed considerably between 1960 and 1969 in the Mt. Vernon area, and the Commission laid a reasonable foundation in its opinions for the result it reached.

In the original Notice of Proposed Rule Making, the Commission specifically discussed its two prior actions (A.4). It was stated that the general grounds for the earlier actions had been a disinclination to assign a VHF channel in a UHF area. The Commission noted, however, that circumstances had changed in the 9 year interval from 1960 to 1969. Speaking generally, and not specifically about the Mt. Vernon area, the Commission talked of the effects of the all-channel TV receiver legislation of 1962, supra, and the concomitant public acceptance of intermixed VHF/UHF markets. ^{11/} These changes from the situation

^{11/} See also the new UHF tuning rules, supra, footnote 5.

as it prevailed in 1960 led the Commission to conclude that the former exceedingly high degree of UHF protection is no longer necessary.^{12/} To be sure, UHF still has not reached parity with VHF, and to that end UHF impact remains a valid consideration, but now the Commission is saying that the effect on UHF will be weighed a little less heavily against the advantages of the requested assignment. The Commission therefore was clearly justified in opening up the rulemaking request for comment in order to determine the specific facts presented by the Mt. Vernon situation. And, as set out in our Counterstatement and explained further below, the Commission found that Soillcom's proposal would cause very little impact on existing UHF stations and that establishment of a UHF station in the Mt. Vernon area is unlikely in the near future.

^{12/} Other examples of recent Commission actions demonstrating that UHF no longer enjoys such a preferred position include Notice of Proposed Rule Making and Notice of Inquiry in Docket No. 18397, 15 F.C.C. 2d 417 (1968); Further Notice of Proposed Rule Making, 22 F.C.C. 2d 603 (1969); and Second Further Notice of Proposed Rule Making, 24 F.C.C. 2d 580 (1970) (all CATV actions proposing to loosen the competitive situation between CATV and UHF); Northeast TV Cablevision, et al., 21 F.C.C. 2d 442 (1970) (less permissive policy on extending the time for the construction of UHF stations). See also Vumore Video Corp. of Colorado, 12 F.C.C. 2d 955 (1968), aff'd sub nom. Pikes Peak Broadcasting Co. v. F.C.C., ___ U.S. App. D.C. ___, 422 F.2d 671, cert. denied, 395 U.S. 979 (1969).

B. The Commission Issued An Eminently Sustainable Decision Based On The Clear Facts Of Record.

Plains' brief contains very little discussion of the facts which were elicited in this case. In fact, the only argument put forward by Plains on this score is that the Commission did not give adequate consideration to some of the contentions made by Plains (Brief, pp. 32-38). However, these arguments were thoroughly considered as we will demonstrate, but more importantly they take their place within the context of all the other considerations leading to the Commission's quite reasonable decision.

The critical issue, which is largely ignored by Plains, and which the Commission thoroughly considered, is weighing the need for the proposed service against the specific impact on UHF. No one questions the fact that there will be some impact on the existing UHF stations in St. Louis and central Illinois. The Commission's conclusions in this regard are set out in paragraphs 25-27 of the Report and Order (A. 16-17) and are summarized in our Counterstatement, ^{13/}supra. But, as pointed out above, the Commission is now willing to permit a small amount of UHF impact where the proposed VHF service will satisfy a substantial perceived need. And that is precisely the situation which prevails in this case. The only other commercial station in this general area of southern Illinois is Turner-Farrar's VHF station in

^{13/} See the attached map, referred to in the counterstatement.

Harrisburg, Illinois, which is some 50 miles from Mt. Vernon.^{14/}
This station only provides a Grade B signal to Mt. Vernon, and it was shown that it carries virtually no programming geared to, or news of, the Mt. Vernon area (A. 14). There are no other commercial assignments in the area. Not only will Soillcom's proposal fill Mt. Vernon's (and the area's) programming needs but it will be providing a first Grade B or better television reception service to almost 50,000 people, and some 90% of the people in Soillcom's proposed Grade A service area will be receiving their first Grade A or better signal.^{15/} Thus, the demonstrated need for a television service in the Mt. Vernon area is great and Soillcom's proposal would meet those needs.

^{14/} As to this VHF station's own "drop-in" in this "UHF area" in 1958 see 16 Pike & Fischer, R.R. 1617.

^{15/} Plains creates an "unresolved factual dispute" out of the materials submitted regarding television reception service in the Mt. Vernon area generally (Brief, p. 36). A careful reading of the cited paragraphs and footnotes in the Commission's opinion reveals that they almost exclusively characterize the contentions of the opposing parties, and do not attempt to decide that one party's views are correct. This is confirmed by the Commission's conclusion that it does "not believe the materials concerning viewing of stations in the proposed Grade A and Grade B area is of substantial merit in this connection [with respect to need]; taking into account the extent to which it may represent CATV viewing and straining for 'fringe' signals. We regard the provision of a service meeting the minimum requirement of our rules as important . . ." Emphasis added. (A. 17).

Apparently accepting the above for the sake of argument, Plains asserts that it and Turner-Farrar suggested certain alternative methods of meeting these needs and that the Commission dealt inadequately with these suggestions. The Commission did, however, consider in turn each alternative, and they were all found wanting (A. 17-18). Thus, as to CATV, the Commission noted that only paying subscribers can receive service, that most of the area surrounding Mt. Vernon is rural and thus not economically conducive to CATV system installation, and that none of the CATV systems in the area is large enough (3500 subscribers) to be required to originate programming (A. 17, 24). CATV would therefore clearly not serve anywhere near the number of people that Soillcom's VHF proposal would, nor would it meet the need for local programming. A UHF station for Mt. Vernon was not found feasible for several reasons. Specifically, the Commission found that "the establishment of a regular UHF station [in Mt. Vernon] appears unlikely for the foreseeable future." (A. 18). The Commission first noted that there are no existing UHF assignments in Mt. Vernon, or for that matter, in Soillcom's proposed Grade A or Grade B service areas, and it was stated that "while such assignments could readily be made, no demand therefor has been

evinced." (A. 15).^{16/} The Commission went on to find that despite the all-channel receiver legislation, UHF set penetration was quite low in the area (about 50% in Mt. Vernon's own county).^{17/} Further, the closest UHF stations are located in St. Louis, Missouri, over 70 miles from Mt. Vernon. This means that the signals which are receivable in the area are almost exclusively VHF. In fact, the only southern Illinois station serving Mt. Vernon is Turner-Farrar's VHF station in Harrisburg. Added to this are the demographic characteristics of the area, namely a widely-scattered population in a predominantly rural setting dotted with small separated towns. This

^{16/} See the Fourth Report on UHF Channel Assignments, 5 Pike & Fischer, R.R. 2d 1587, 1593 (1965), where the Commission deleted all southern Illinois commercial UHF assignments, including one at Mt. Vernon, on the ground that there was "no reasonable expectancy" for commercial UHF stations in the area.

^{17/} Plains continues to argue that the Commission is being inconsistent when it tolerates some impact on the central Illinois UHF stations because of "changed circumstances" and then states that UHF development is remote in the Mt. Vernon area. The Commission succinctly justified this result as follows (A. 17):

But this is a distinction which must be made, here as in other UHF-VHF decisions. UHF is developing, though it has not yet reached parity with VHF, to a point where, as mentioned, we believe we need not take absolute, total heed of possible impact consequences. This is true in areas such as Central Illinois, of long-standing and advanced UHF development. But that does not mean that the two areas of the television service are as yet equal, so that UHF development in southern Illinois is likely in the near future.

situation is not naturally favorable to UHF because of UHF's inferior propagation characteristics,^{18/} and coming on top of the factors set out above, the Commission quite reasonably concluded that "establishment of UHF is not likely" in the Mt. Vernon area in the foreseeable future.^{19/} Compare KTIV Television Co., 4 Pike & Fischer, R.R. 2d 243 (1965). Likewise, the Commission held that a low-powered "community" station would not at all meet the needs of the large area outside of Mt. Vernon itself, and that an educational station would be unable to meet the commercial needs in the area (A. 18). Thus, having once perceived and defined the need for television service in the Mt. Vernon area, the Commission thoroughly considered the alternative methods of meeting that need and concluded that only a VHF station could adequately do the job.

^{18/} We note with some irony that Plains is urging the use of a UHF station in Mt. Vernon while at the same time opposing Soillcom's VHF proposal on the ground that a viable operation is not possible in Mt. Vernon (A. 103-106).

^{19/} Plains continues to argue about the terrain being suitable for UHF propagation despite the Commission's assertion in its reconsideration opinion that terrain played no part in its decision (A. 21). In any event, it is known that a VHF signal will be stronger over a greater distance than a UHF signal no matter what the terrain conditions. In the thinly settled Mt. Vernon area a VHF station would thus be more able to meet the technical service requirements and programming needs.

Related to the need question is Plains' assertion that the assignment of channel 13 to Mt. Vernon is somehow contrary to Section 307(b) of the Communications Act, 47 U.S.C. 307(b). This contention is somewhat strained in light of the fact that Soillcom's proposal will satisfy the first two principal national television allocation priorities by providing a first television service to a "white area" containing some 50,000 people, and it will provide a first outlet for local self-expression to Mt. Vernon and a number of other nearby communities. Sixth Report and Order on Television Allocations, 1 Pike & Fischer, R.R. (Part III), 91:601, 620 (1952). The Commission added these factors to the other facts showing need, considered the suggested service alternatives and the possible impact on UHF, and concluded that Section 307(b) would be served by making the assignment. It is difficult to see any error, much less an abuse of discretion, in this decision. See Community Telecasting Service v. F.C.C., C.A.D.C., Case No. 18,453, affirmed without opinion (1964); and Fort Harrison Telecasting Corp. v. F.C.C., 116 U.S. App. D.C. 347, 324 F.2d 379 (1963), cert. denied sub nom. Sangamon Valley Television Corp. v. United States, 376 U.S. 915 (1964).

C. The Commission's Action In This Case Is
Not Inconsistent With Other UHF Actions.

Much of Plains' brief is given over to trying to illustrate that the Commission has here grossly deviated from its UHF protection policy. As it did before the Commission, Plains sets forth cases which purportedly demonstrate that the Commission has treated the instant situation in a manner completely at odds with precedent, all without adequate explanation. See Melody Music, Inc. v. F.C.C., 120 U.S. App. D.C. 241, 345 F.2d 730 (1965), cited by Plains. However, as the Commission went to some lengths to explain, each allocations case must be decided on its own facts. The Commission dealt with several of the cases cited by Plains, pointing out the factual distinction between those situations and the one at bar. That and the internal consistency of the decision under review are sufficient to sustain the result reached.

Plains has set out an extensive overview of the Commission's policy of fostering UHF development. The Commission has not deserted this policy. In answer to Plains' argument on reconsideration below that the Commission was turning

its back on UHF, the Commission said (A. 22):

The Commission's policy of fostering the development of UHF was originally "blocked out" in the case of Triangle Publications, Inc., 29 FCC 315, 17 RR 624 (1960), affirmed sub nom. Triangle Publications, Inc. v. FCC, 110 U.S. App. D.C. 214, 219 F.2d 324, 21 RR 2039 (1961), and has been consistently applied. This general policy is still in force and underlies the decision in this case. The particular circumstances here involved directed that we make the assignment under that policy. [Footnote omitted.]

The Commission went on to point out that the satisfaction of the two first national television allocations priorities (service to a "white" area and a first local outlet) in an area where UHF development is not likely in the near future, and where the impact on distant UHF stations would be insignificant, gave rise to a situation where no violence would be done to the Commission's UHF policy by making the requested VHF assignment. Such decisions clearly involve the balancing of sometimes competing equities. The resulting ad hoc determinations must be judged on their facts.

It is possible to painstakingly distinguish each case cited by Plains on its facts,^{20/} but that misses the point. As long as the Commission does not abuse its discretion

^{20/} Thus, Hutchison-Wichita, Kansas, 3 F.C.C. 2d 556 (1966), Bloomington-Indianapolis, Indiana, 1 F.C.C. 2d 496 (1965), and Salt Lake City, Utah, 12 Pike & Fischer, R.R. 2d 1584 (1968), all involve refusals to add another VHF assignment in large towns. This is done in order to preserve the possibility of an intermixed VHF/UHF market, especially in light of the obviously weak need showings the VHF applicants made in those cases. Jefferson Standard Broadcasting Co., 23 F.C.C. 2d 931 (1970), involves similar considerations although the request there was for changed facilities which would bring an existing VHF station's contour into a market with three VHF stations, one UHF station, and two unused UHF assignments. Louisiana Television Broadcasting Corp., 17 F.C.C. 2d 973 (1969), also involved a change in facilities. The new contour would have threatened an existing money-losing UHF station in another town where two other VHF stations already operate. The striking thing about all of the above cases is that none of the proponents was able to come close to Soillcom in its showing of need for the service. Staunton-Waynesboro, 3 Pike & Fischer, R.R. 2d 1677 (1964), is somewhat unique. The showing of need encompassed two channels, and only one VHF channel could be dropped in. Added to this was evidence of excellent near term UHF prospects and serious technical objections from a nearby government research facility. The closest case to the one at bar is Salina, Kansas, 11 F.C.C. 2d 255 (1968). There the Commission did refuse to drop in a VHF channel, even though other VHF signals served the area, because it felt that UHF prospects were good. However, a look at the facts reveals the distinction. Thus, the population of Salina is approximately three times that of Mt. Vernon; Salina had three UHF assignments; there had been a UHF station in Salina which failed but with minimal facilities; and the assignment to Salina would necessitate a substitute assignment to Lincoln Center, Kansas, which would have to be short-spaced.

in applying the pertinent policies to the facts, the result it reaches must be sustained. See Coastal Bend Television Co. v. F.C.C., supra; Van Curler Broadcasting Corp. v. United States, supra; Logansport Broadcasting Corp. v. United States, supra; Fort Harrison Telecasting Corp. v. F.C.C., supra.

In its attempt to show that the Mt. Vernon assignment is a unique aberration, Plains of course cites only those Commission cases which decline the particular VHF request. However, there are also many cases where the Commission has gone the other way where the facts have dictated that particular course of action. See, for example, Oklahoma City, Oklahoma, 25 Pike & Fischer, R.R. 1687 (1963), where the Commission permitted a VHF station in Enid to move to Oklahoma City in order to provide a third competitive VHF station in that city, after finding that such a move would not retard the already unlikely development of UHF in the area; KTIV Television Company, 4 Pike & Fischer, R.R. 2d 243 (1965), where the Commission allowed two VHF stations to move their transmitter sites and raise antenna heights, after finding that overlap with an existing UHF station would not cause significant impact and that the spread-out characteristics of the population precluded local UHF development in the near future; and

Rhineland, Wisconsin, 3 Pike & Fischer, R.R. 2d 1683 (1964), where the Commission moved in a VHF channel to Rhineland in spite of an unused UHF assignment, holding that the prospects for UHF development in the near future were dim. The Commission makes no claim that these cases are so like the case at bar that the result reached was foreordained. However, they do serve to illustrate what we have said above, namely, that the Commission applies the prevailing policies to the facts at hand in order to reach the most reasonable solution. In the case at bar, the Commission announced in the Notice of Proposed Rule Making that it no longer intended to shelter UHF stations to the same degree as in the past. This determination was applied to the elicited facts surrounding Soillcom's Mt. Vernon proposal. The need for Soillcom's proposed service was weighed against the impact which the VHF station would have on existing and prospective UHF stations, and the Commission quite reasonably decided to grant Soillcom's rulemaking request.

CONCLUSION

For the foregoing reasons, the Commission's decision to assign channel 13 to Mt. Vernon, Illinois, should be affirmed.

Respectfully submitted,

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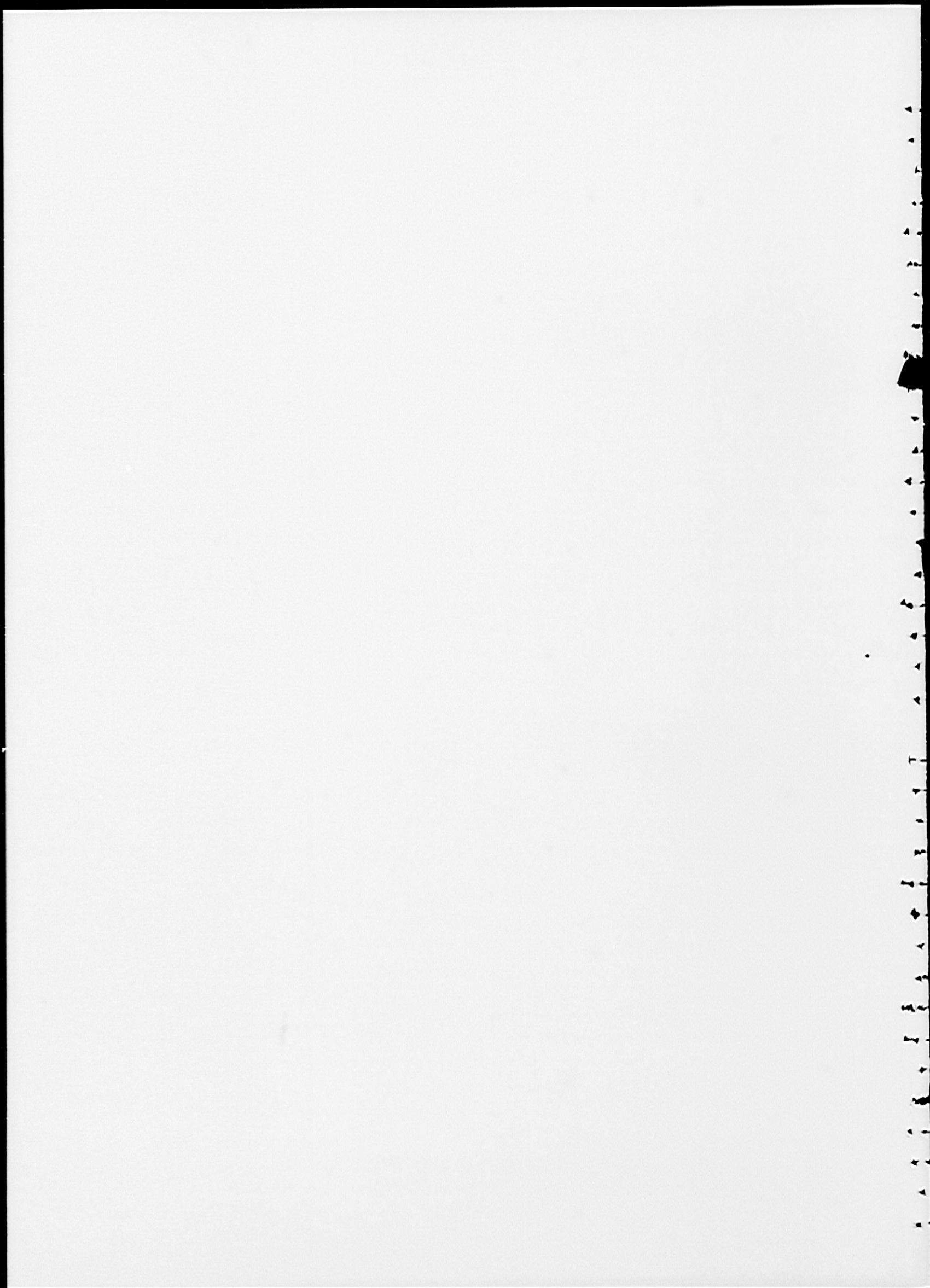
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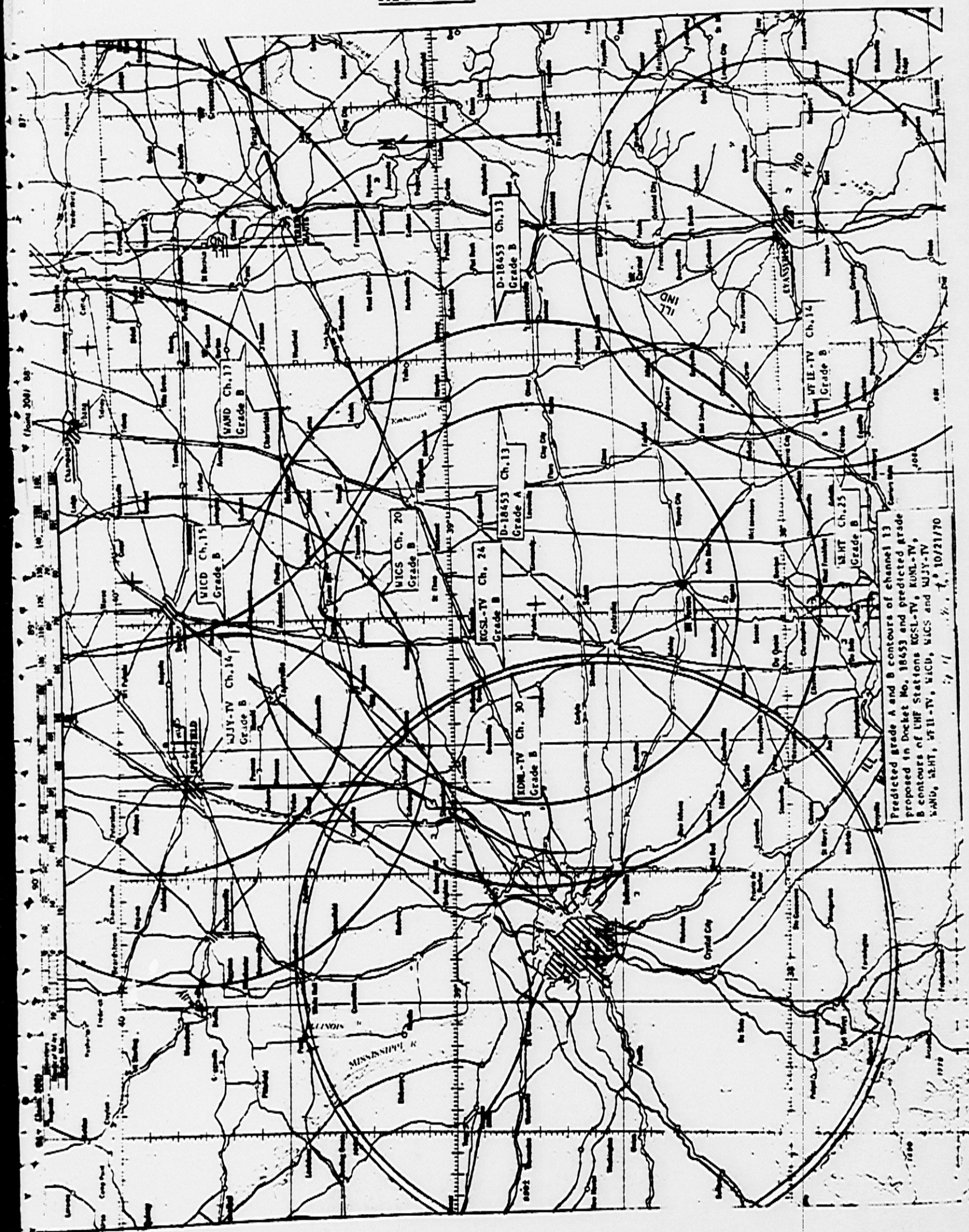
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Federal Communications Commission
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October 19, 1970



APPENDIX



REPLY BRIEF FOR PETITIONER

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,246

PLAINS TELEVISION CORPORATION,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and
UNITED STATES OF AMERICA,
Respondents,
and

SOILLCOM, INC.,
Intervenor.

Petition to Review Decisions of
The Federal Communications Commission

United States Court of Appeals
for the District of Columbia Circuit

FILED NOV 19 1970

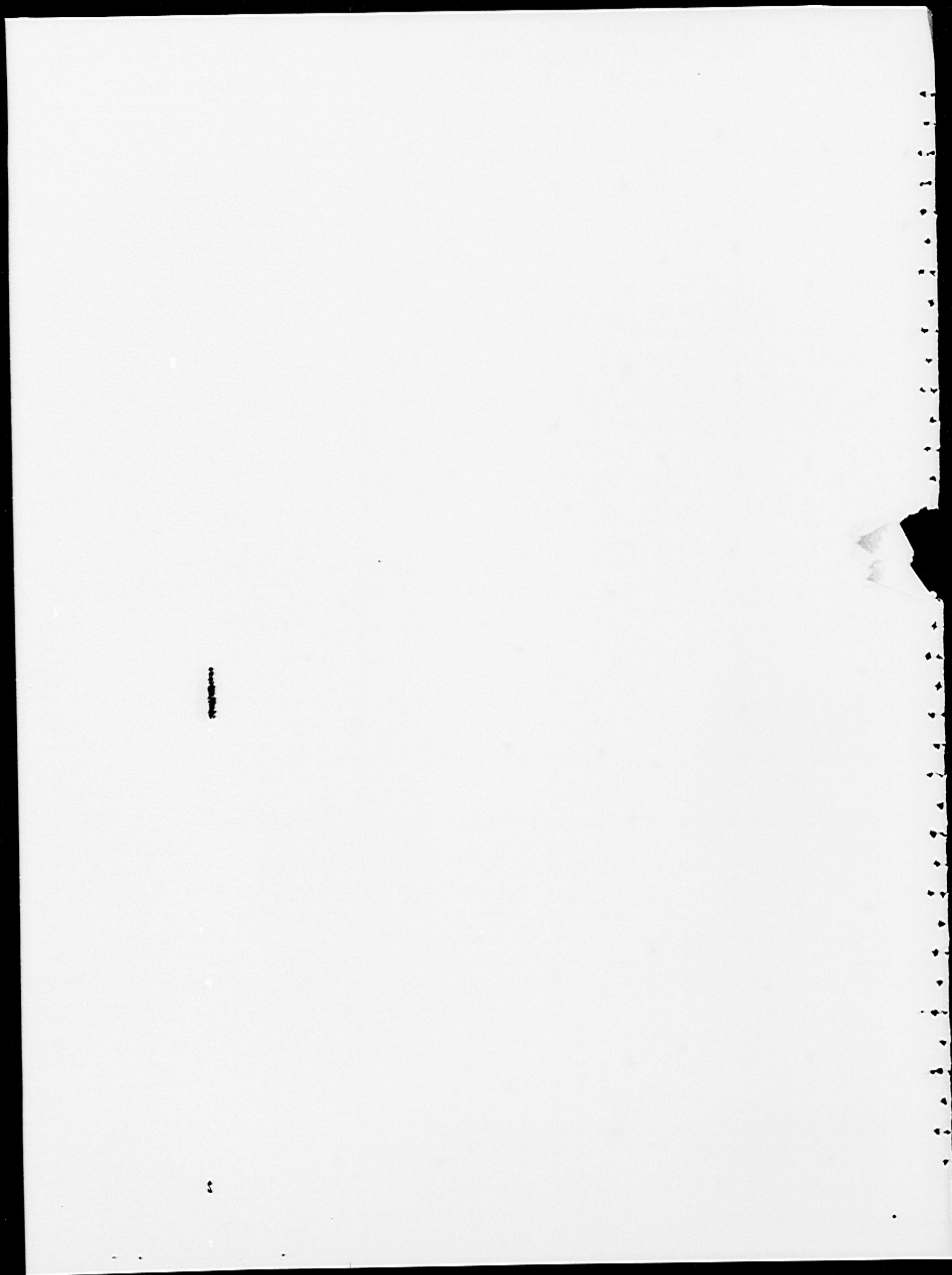
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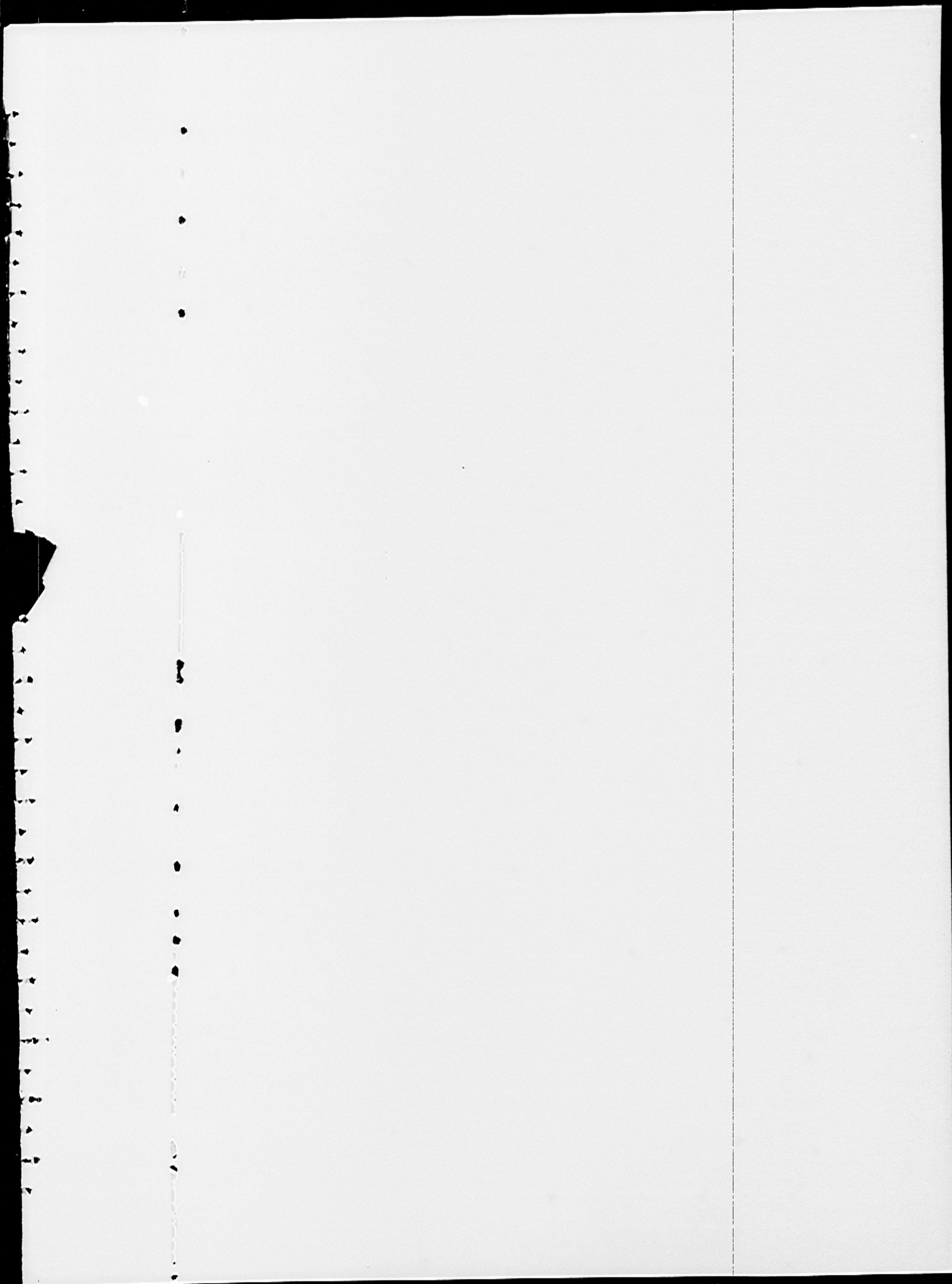
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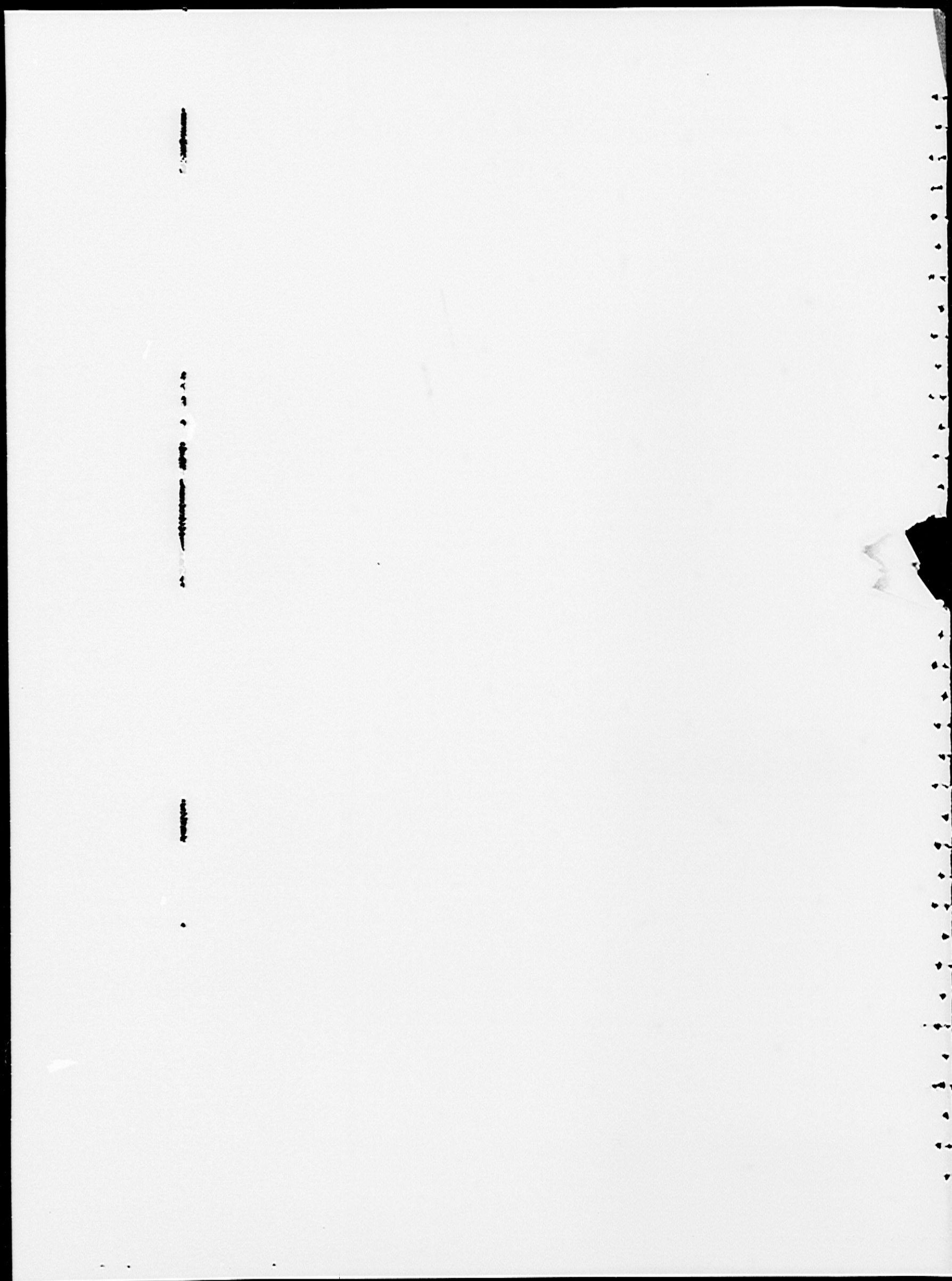
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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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FEDERAL COMMUNICATIONS COMMISSION
and
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Intervenor.

Petition to Review Decisions of
The Federal Communications Commission

REPLY BRIEF
FOR PETITIONER PLAINS TELEVISION CORPORATION

I

THE COMMISSION'S ACTION IS PATENTLY INCONSISTENT AS MEASURED AGAINST BOTH PAST UHF DECISIONS BASED ON THEN PREVAILING POLICIES AND SUBSEQUENT DETERMINATIONS BASED ON ASSERTED POLICY MODIFICATIONS

In a rather revealing phrase, counsel for the Commission has characterized the issue presented as being whether the agency "reasonably applied *prevailing*

policies" to the factual situation at hand. (Comm. Br., p. 1). Highlighting, however, the underlying difficulty, Commission counsel subsequently relies on an asserted *modification of policy* to support the Commission's action. (Comm. Brief, pp. 12-13). Petitioner submits in reply, that, as reflected in past and recent Commission decisions, the foregoing analysis of the administrative process simply emphasizes its arbitrary and capricious nature.¹

The Commission's decision to allocate VHF channel 13 to Mt. Vernon engenders inconsistency not only from its arbitrary dissimilarity (1) with earlier decisions in the identical vicinity and (2) like cases in other areas (Petitioner's Opening Brief, pp. 16-31), but in a failure to either clarify the "prevailing" UHF policy elsewhere or, if this has indeed been modified, to articulate the relevant modification in similar decision-making situations.

As the Commission's Brief points out, on the facts below it was apparently concluded that "the former exceedingly high degree of UHF protection is no longer necessary." (Comm. Br., p. 13). Rather, under this new standard, the Commission is said to have held that "the effect on UHF will [now] be weighed a little less heavily against the advantages of [a] requested assignment." (*Ibid.*). In this context, however, it is particularly distressing that the Commission here not only reaches a result completely contrary to earlier rulings on the same matter (and in general conflict with an overall UHF policy theretofore applicable), but that in doing so it structures a new policy standard which seemingly has a most abrupt demise, the Commission in subsequent decisions

¹ This Reply Brief is directed principally to the arguments raised in the Commission's Brief. While Intervenor Soillcom, Inc. also filed a brief in support of the Commission's decision, it was devoted exclusively to reasserting the need for local television service at Mount Vernon, a proposition that Petitioner has never directly challenged. Thus, whereas both Intervenor (Int. Br., p. 11) and the Commission (Comm. Br., p. 18) seem to suggest the contrary, it should be emphasized that Plains Television has not questioned the actual claims of local service raised in Soillcom's pleadings below, but merely pointed to the abundance of measured television service available in the area and the marginal conditions that appear to exist for any potential station; and, coupled with the expected adverse UHF impact in near-by areas, urged more practical alternative means.

either applying the "old" policy or ignoring the "new" policy. Against this background, the Mount Vernon assignment is revealed as an *ad hoc* aberration which must be reversed.

The Commission's *Report and Order* herein is more than a year old. In that time, UHF impact cases have come and gone with no perceptible policy modification. A number of these cases were cited in Petitioner's Opening Brief and need not be restated here. (Petitioner's Br., pp. 25-21). In point of fact, the Commission, with the sole exception of this case, continues to apply a general UHF policy unfettered by the constraints fashioned in the Mount Vernon assignment. Thus, in addition to those cases cited previously, recent months have witnessed several additional Commission decisions bearing upon these matters. None of them, however, refers to or relies on a new or changed UHF policy standard such as employed in Mount Vernon.

In chronological order, on August 31, 1970, the Commission released a *Notice of Proposed Rule Making* wherein it proposed to assign VHF channel 2 to Kerrville-Fredericksburg, Texas. *In re Amendment of Section 73.606(b) of the Commission's Rules, Table of Assignments, Television Broadcast Stations (Kerrville-Fredericksburg, Texas)*, 35 F.R. 14095 (September 9, 1970). Noting that the assignment would create overlap with embryonic UHF stations at Austin and San Antonio, the Commission merely announced that the ultimate question requiring resolution was whether the VHF assignment, providing a first local service to Kerrville and Fredericksburg, was consistent with its long-standing policy of fostering UHF development. No reference was made to any contemporary change in the application of that policy.

Several days later the Commission designated for hearing the proposal of an Indianapolis VHF station to re-locate its transmitter site resulting in a further encroachment on the service areas of five UHF stations situated to the north of the city in an all-UHF area. *Indiana Broadcasting Corporation, Memorandum Opinion and Order*, released September 9, 1970, 25 FCC 2d 421, 20 Pike and Fischer RR 2d 66 (1970). Significantly, while the Commission

referred to an earlier 1967 decision which had recognized the disadvantages of increased VHF competition in the UHF area, it did not in presently deciding to evaluate the matter in hearing rely on "changed circumstances" or defer to a more "relaxed" UHF policy. It simply specified, *inter alia*, a UHF impact issue.

On October 12, 1970, the Commission acted upon a petition to assign VHF channel 10 to Clarksville, Tennessee, near Nashville. *In re Amendment of Section 73.606(b) of the Commission's Rules, Table of Assignments, Television Broadcast Stations (Clarksville, Tennessee)*, 35 F.R. 16181 (October 15, 1970). UHF impact was one of several matters that concerned the Commission in responding to this request. Thus, the Commission solicited comments from interested parties respecting possible restrictions on the proposed assignment to minimize impact on UHF development in Nashville and elsewhere in the coverage area of the proposed station.

While the Commission does refer to the Mount Vernon assignment decision in *Clarksville*, it does so only for the limited proposition that the lack of demonstrable interest in UHF can be considered in weighing the conditions of prospective VHF service. Otherwise the Commission treats the UHF impact issue in the presumptive manner that has long characterized this policy prescription.

Finally, on October 26, 1970, the Commission released a decision which denied a petition to institute rule making which would transform a VHF channel reservation at Ogden, Utah from an educational to a commercial channel; permitting joint educational and commercial operation. *Educational TV Assignment at Ogden, Utah*, ____ FCC 2d ____, 20 Pike and Fischer RR 2d 1584 (1970). One of the principal reasons the request was denied was the fear, almost unilaterally expressed by the Commission, of adverse UHF impact — impact considerably more remote than here since no existing UHF stations were involved. The Commission merely noted that "*the thought suggested by [one of the parties] that the use of channel *9 for commercial purposes would hinder*

the development of UHF broadcasting in the Salt Lake City and Ogden markets, seems to be well founded, in light of the industry's evaluation of the competitive effectiveness of UHF." 20 Pike and Fischer, RR 2d at 1588. (emphasis added).

The contrast is vivid, therefore, between the standard employed by the Commission in applying its UHF policy in the *Ogden* proceeding, the Commission seemingly going out of its way to protect even potential UHF — and its more rigid application in *Mount Vernon* where it is stated that the Commission no longer intends to shelter UHF stations (in any stage of development) to the degree as in the past. (Comm. Br., p. 24). The "changed circumstances" approach is illusive indeed.

We do not suggest that factual distinctions do not exist in all of these cases as viewed against the decision herein. We simply note that if a new higher standard of UHF impact has evolved it should be reflected in other cases involving that issue. Since it is not, the isolated arbitrary nature of the Mt. Vernon assignment is underscored.

Commission counsel refers to other instances wherein the Commission has allegedly taken action that indicates UHF no longer enjoys the same "preferred position" heretofore associated with the UHF impact policy. (Comm. Br., p. 13). However, these are, with one exception, cases or rule making proceedings involving CATV — most of which preceed the decision in the instant case. It is questionable, therefore, whether such cases are anything but tangentially related to the matters at hand. The Commission's CATV policy evolved substantially out of its UHF policy,² not the reverse, and it is the CATV policy which is the focus of modification in these proceedings.

The Commission states that each allocations case must be decided on its own facts. (Comm. Br., p. 20). Once this premise is accepted, however, the

² Together with a fundamental concern for maintaining the present competitive posture of all over-the-air television. See *United States v. Southwestern Cable Co.*, 392 U.S. 157, 164-167, 174-176 (1968).

further observation must be made that the underlying policy does not and should not fluctuate with each case. In this instance there is acknowledged impact on UHF. (Comm. Br., p. 14). However, while we are informed that the Commission is now willing to permit a small amount of UHF impact where the proposed VHF service satisfies a substantial perceived need (Comm. Br., p. 14), in other subsequent instances the Commission seemingly ignores this "new" or "relaxed" standard and defers rather summarily to a UHF impact policy even in cases where UHF service is merely hypothetical. *Educational TV Assignment at Ogden, Utah, supra.*

As Petitioner acknowledged in its Opening Brief, administrative agencies are not bound by an unyielding deference to consistency, since some flexibility is inherent to their responsibilities. Further, as pointed out in the Commission's Brief, agencies must also be permitted to adapt their rules and policies to the demands of changing circumstances. (Comm. Br., p. 12). While Petitioner has elsewhere addressed the problems in this particular case as they relate to the specific Commission reversal of position on the "changed circumstances" asserted, an additional dimension is revealed in the Commission's apparent failure to apply the stated changed policy in similar subsequent circumstances. Collectively the Commission actions amount to an arbitrary and capricious exercise of discretion in deciding to allocate channel 13 to Mount Vernon.

Under these circumstances, the Commission's action is clearly within the scope of judicial review. Reviewing courts "are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute. *N.L.R.B. v. Brown*, 380 U.S. 278, 291-292 (1965).

Thus, while the Commission must not blindly adhere to rigid standards of consistency, its discretion is not unlimited; if it were, judicial review would become a nullity. A minimum level of consistency must, therefore, pertain. To adopt different standards for similar situations, as here, is to act arbitrarily. See *T. I. McCormack Trucking Company v. United States*, 251 F. Supp. 526

(N.J. 1966). As this Court has remarked on an earlier occasion in a similar circumstance,

"The paramount objective [of judicial review] is to see whether the agency, given an essentially legislative task to perform, has carried it out in a manner calculated to negate the dangers of arbitrariness and irrationality in the formulation of rules for general application in the future."³

Petitioners submit that upon reviewing the history of this specific assignment, against the background of other proceedings and decisions, the Commission's action is irreconcilable and therefore arbitrary and capricious.

Accordingly, it is respectfully submitted that the Commission's action allocating Channel 13 to Mount Vernon should be reversed and set aside.

Respectfully submitted,

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³ *Automotive Parts and Accessories Association v. Boyd*, 132 U.S. App. D.C. 200, 208, 407 F.2d 330, 338 (1968).